Supreme Court, U.S.
FILED

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NO.

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IN THE

Supreme Court of the United States

VINCENT GRASSO, ET AL.,

Petitioners,

v.

CITY OF NEW BEDFORD, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MASSACHUSETTS SUPREME JUDICIAL COURT

PETITION FOR WRIT OF CERTIORARI

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120 pp

QUESTIONS PRESENTED

I. Whether government actors can be held jointly liable for using and participating in diverse regulatory proceedings to keep the value of land down while the government considers whether to take the land for a secondary wastewater treatment plant.

II. Whether it was error under *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977) on cross motions for summary judgment to fail to consider direct and substantial evidence of the intent of responsible City officials to deny an application to change zoning because it would increase the value of land and otherwise facilitate the owner's development and use of same when the City was considering whether to take the land for a secondary wastewater treatment plant.

III. Whether the state statute of limitations for the assertion of the Fifth Amendment right to compensation for a taking by regulatory action can be construed in a manner prohibited by *United States v. Dickinson,* 331 U.S. 745 (1947) to force landowners to engage in the piecemeal and premature litigation of potentially unripe claims and to otherwise unfairly put the burden on the landowner to determine the precise moment a taking has occurred during regulatory processes when the taking has been effected by a continuing series of decisions and actions taken by diverse government actors in different ongoing administrative and other proceedings.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Vincent Grasso, Robert P. Regan, Palmers Cove Limited Partnership, and Old New Bedford, Plaintiffs-Petitioners;

City of New Bedford, Massachusetts Executive Office of Environmental Affairs; Defendants-Respondents.

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company owning 10% or more of the Old New Bedford Corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners ("Grasso"; also referred to as "ONBW" by the Massachusetts Appeals Court) respectfully prays that this Court issue a writ of certiorari to review the judgment of the Massachusetts Appeals Court which the Massachusetts Supreme Judicial Court has declined to review.

OPINION BELOW

Grasso, et. al. v. City of New Bedford, et. al., 55 Mass. App. Ct. 1116 (2002).

JURISDICTION

The Court of Appeals of Massachusetts Order was entered on September 12, 2002. (Pet. App. 21a). Grasso's timely Application for Further Appellate Review to the Supreme Judicial Court was denied on October 30, 2002. (Pet. App. 1a). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

M.G.L. c. 79, § 10 provides in relevant part: "When the real estate of any person has been taken for the public use . . . but such taking . . . was not effected by or in accordance with a formal vote or order of the board of officers of a body politic or corporate duly authorized by law, . . . the damages therefor may be recovered under this chapter. . . . In case of a specific taking . . . or other act causing destruction or damage or depriving the owner of the use of his property permanently or for a definite period of time the damages shall be assessed as of the date of such taking . . . or other act and the right thereto shall vest on such date and a petition for an award of damages therefor under this section may be filed within one year thereafter; otherwise damages shall be assessed with respect to any parcel of property as of the date when such property was first injuriously affected, the right thereto shall vest upon the completion of the public improvement which caused the injury, and a petition for an award of damages therefor under this section may be filed within one year after such completion." M.G.L. c. 79, § 10.

STATEMENT OF THE CASE

This case involves the prolonged, concerted, and deliberate efforts of duly elected officials of the City of New Bedford ("City") and various Massachusetts state actors, including officials of the Massachusetts Executive Office of Environmental Affairs ("EOEA") and its departments among others, to delay and prevent Grasso from developing his property while the City considered whether to take the property for a secondary wastewater treatment plant.

1. *Background*

Grasso was the owner of land[1] on and in the harbor of the City. (Pet. App. 23a). The City and the Commonwealth of Massachusetts entered into a consent decree in which the City agreed to build a secondary wastewater treatment plant. (Pet. App. 6a and 23a). As part of the consent decree, the City undertook engineering studies to determine the best location for the proposed plant, all of which were subject to the review and approval of the Commonwealth. (Pet. App. 6a). Grasso's land was one of the principle sites under consideration by the City for the location of the plant; the other being the land adjacent to the existing treatment plant in the "Fort Rodman" area of the City. (Pet. App. 23a-24a). Under the Federal Clean Waters Act, federal funds were available for the construction of the plant, but the cost of acquiring the land for the plant was to be borne entirely by the City. (Pet. App. 23a). There was considerable controversy over the siting of the secondary wastewater treatment plant which lasted from February 2, 1987 until "long after the foreclosure" sale of Grasso's property on August 28, 1991. (Pet. App. 23a and 33a).

"The plaintiffs' action alleges that the concerted actions of the city and the EOEA with respect to the parcel constituted a 'taking' in violation of the Fifth and Fourteenth Amendments of the United States Constitution . . . [T]he plaintiffs contend that the city and EOEA effected a 'regulatory taking' by 'persistently denying and conditioning permits' and refusing to allow 'changes in land-use regulations.'" (Pet. App. 33a).

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[1] Grasso's land was locally known as "Standard-Times Field". (Pet. App. 23a).

2. *Claims against the City*

The trial court entered summary judgment against Grasso on his claims against the City. In affirming, the Massachusetts Appeals Court found:

> The acts challenged by the plaintiffs may be divided into two categories. The first comprises those acts through which, the plaintiffs argue, the city induced the Commonwealth (the EOEA, the Legislature, and the Governor) to make certain decisions adversely affecting ONBW's parcel. Those acts include inducing the EOEA to impose an unduly burdensome scope on the EIR for the marina project; inducing the EOEA to condition ONBW's State and Federal permits for the marina project on the rezoning of the parcel as well as on the de-designation of the site as a port area and on the change in the harbor line; and inducing the Governor to condition the harbor line change on the parcel's not being chosen as a site for the city's treatment plant. The second category comprises those actions for which the city was directly responsible. This category includes only the city's denial of ONBW's position to rezone the parcel from industrial B to mixed-use business.

(Pet. App. 36a-37a).

With respect to the first category of claims above, the Appeals Court ruled as follows:

> The motion judge recognized that in order to hold the city responsible for those decisions resting in the control of the

> EOEA, the DEP, the Legislature, or the Governor, the plaintiffs needed to prove that those decisions were not only affected by the city's influence, but also that the city could be held liable in a takings action on those grounds. Although there is certainly enough evidence to suggest that the city advocated for the steps taken by the EOEA, the Legislature, and the Governor, the city cannot be held liable in a takings action for publicly urging the Commonwealth's agencies and officials to pursue a particular course of action.

(Pet. App. 37a).

With respect to the second category the Appeals Court ruled;

> The plaintiffs contend that the city's refusal to rezone the parcel amounted to a taking because it failed substantially to advance a legitimate land use interest. The plaintiffs do not argue that the current zoning classification itself fails to advance a legitimate interest. Rather, they argue that the city's application of the zoning laws in this instance did not substantially advance any interests tied to zoning. The plaintiffs assert that the city denied the petition because it feared that rezoning the parcel would increase the value of the property and, thus, increase the cost to the city of appropriating the land in the future if the parcel was chosen as the site for the wastewater treatment facility.

(Pet. App. 40a).

Ignoring the substantial direct evidence in the form of statements made by the City Councilors to Grasso as well as publicly before, during, and after the hearing on Grasso's application as well as other actions and statements made by these same Councilors in other contexts, including his first application, and the considerable public pressure that these Councilors were under, the Massachusetts Appeals Court concluded: "We are uncertain, however, of the precise purpose for the denial of the plaintiffs' petition because the city did not record its reasons for doing so. . . . The summary judgment record contains no insight into the reasoning of the city council ordinance committee. . . . Accordingly, on the summary judgment record, the plaintiffs have not shown that they will be able to prove that the denial of their petition did not substantially advance a legitimate public interest. (Pet. App. 40a-41a).

3. *Claims against the EOEA*

Prior to granting summary judgment for the City, the trial court dismissed Grasso's claims against the EOEA on its second motion for judgment on the pleadings. The issue of the statute of limitations was raised by the EOEA "below", but was not addressed by the motion judge in his decision. (Pet. App. 46a, n.16).[2] Before addressing the statute of limitations, however, the Massachusetts Appeals Court first made this observation regarding the ripeness of Grasso's claims:

> Although the motion judge reached the merits of the plaintiffs' arguments below, she also noted that some of those arguments were not ripe because the plaintiffs failed to exhaust administrative

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[2] Both the City and the EOEA brought motions to dismiss on the grounds of the statute of limitations which motions were denied, the denial of which was not appealed by either. (Pet. App. 3a-5a).

> remedies. . . The plaintiffs no longer own the parcel and no longer seek to develop it at all. *Wilson v. Commonwealth*, 31 Mass. App. Ct. at 766. We are confident that the governmental regulations are sufficiently well defined for us to determine whether any reached the magnitude of a compensable taking. Accordingly, we decline to dismiss any of the plaintiffs' claims on this basis.

(Pet. App. 36a, n.10).

Despite its expressed concern over the ripeness of Grasso's claims, which it resolves in part because Grasso "no longer own[s] the parcel and no longer seeks to develop it at all", the Massachusetts Appeals Court declined to consider Grasso's loss of his land as relevant to its consideration of the statute of limitations for bringing his claims. The court stated the following:

> [T]he operative date for calculating the statute of limitations is the date of the EOEA's action preventing development of the property. The EOEA's actions, however, were ongoing in nature, and it is not apparent in looking to the pleadings whether any singular act, in and of itself, rose to the level of a taking. "The statute requires a definite and distinct act as beginning the period in which a petition for damages may be filed. The Legislature did not intend to put the burden upon the landowner to determine when in the partial performance of a piece of work the period for bringing a petition would start to run against him." *United States Gypsum Co. v. Mystic River Bridge Authy.*, 329 Mass. 130, 142 (1952), citing *United States v. Dickinson*, 331 U.S. 745 (1947). The

critical point occurs when the "landowner has actually parted with his property or its possession or some interest therein." *United States. Gypsum Co. v. Mystic River Bridge Authy., supra* at 141.

> The plaintiffs contend that the relevant moment was the date of foreclosure on the property. . . . The date of the foreclosure is not related to the alleged taking. Foreclosure results from a breakdown in the relationship between mortgagor and mortgagee. It marks the moment when the plaintiffs ran out of money, but does not shed light on when a regulatory taking may have occurred. . . . For purposes of eminent domain, the significant event is the taking of the plaintiffs' property for a public purpose. In a regulatory takings action, the injury is defined by the regulatory action and its impact on the landowner's property interests.

Although the first amended complaint is barren of any dates or references to specific regulatory actions taken by the EOEA[3], the relevant facts

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[3] At the time the complaint against the EOEA was dismissed there was "only a single allegation that can be credited to the EOEA. The allegation states that:

> subject to the screening studies and so long as it was designated the alternate site for the treatment plant, the plaintiffs were not allowed by the defendants to develop the property in a manner incompatible with its potential use as a site for the waste water treatment plant."

(Pet. App. 46a, n.15). At that time there was pending a Motion to Amend which provided substantially greater detail regarding

> were part of the public arena and are undisputed. Indeed, in their reply brief, the plaintiffs cite to certain actions taken by the EOEA that would serve to evidence injurious regulations for the purposes of establishing the starting point for a statue of limitations analysis. Even assuming that any of these events constituted a taking, none occurred within one year of the filing of the plaintiffs' complaint. Even taking a more generous approach and looking to the latest action taken by the EOEA regarding the plaintiffs' property does not help the plaintiffs. The latest possible action taken by the EOEA occurred in June, 1990, when the EOEA refused to de-designate the property as an alternative site for the treatment plant. The plaintiffs' complaint was not filed until July 8, 1992. Accordingly, even taking a generous approach, the plaintiffs' action is barred by the statute of limitations.

(Pet. App. 47a-49a).

Grasso's claims. This motion was subsequently allowed "insofar as it amends claims against the City of New Bedford and denied insofar as it seeks to revive claims against Executive Office of Environmental Affairs." (Pet. App. 4a). The Appeals Court construed this to mean "The judge allowed the plaintiffs to amend those claims applying to the city but denied all amendments applicable to claims against the EOEA." (Pet. App. 46a, n.14).

REASONS FOR GRANTING THE WRIT

This case presents the substantial Fifth Amendment question of whether diverse government actors can be jointly liable to pay "just compensation" under the Fifth Amendment when they've acted in a coordinated and concerted manner through their participation in various regulatory and other proceedings to prevent and delay a landowner from obtaining permits or otherwise improving his land for the express purpose of keeping him from enhancing the market value of the land while one of the government actors is considering whether to take the land for a secondary wastewater treatment plant. This is an issue which has not been, but should be, settled by this Court.

This case also presents substantial Fifth and Fourteenth Amendment questions which the state court has decided in a manner which conflicts with this Court's decisions; to wit, 1) failure to consider evidence deemed relevant and material in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977) to determine the purpose and intent of a local legislative body for denying an application to change zoning; and 2) construing a statute of limitations for Fifth Amendment "just compensation" claims in a manner prohibited by *United States v. Dickinson,* 331 U.S. 745 (1947) by forcing landowners to engage in the piecemeal and premature litigation of potentially unripe claims and to otherwise unfairly put the burden on the landowner to determine the precise moment a taking has occurred during a regulatory process when the taking has been effected by a continuing series of decisions and actions taken by diverse government actors in different ongoing administrative and other proceedings.

Furthermore, this case evidences a pervasive and profound misapprehension among government officials throughout the Commonwealth of Massachusetts of the most basic rights guaranteed by the Fifth and

Fourteenth Amendments which the state court heretofore has declined to redress.

I. PERVASIVENESS OF LACK OF APPREHENSION OF THE RIGHTS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENT AMONG STATE AND LOCAL OFFICIALS IN MASSACHUSETTS.

It is the cornerstone of the protection afforded by the Fifth and Fourteenth Amendments that the government can not purposely use its police power to regulate the use of property to advance the government's proprietary interests. *Mahon v. Pennsylvania*, 260 U.S. 393, 415 (1922). This is at the heart of the requirement that land use regulation must "substantially advance[] legitimate state interests". *Nollan v. California Coastal Comm.*, 483 U.S. 825, 834 (1987), quoting from *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). It is obviously not a legitimate state interest to avoid the compensation requirement of the Fifth Amendment. Yet the repeated and continuous actions by the numerous state and local officials in this case demonstrates that government officials in Massachusetts are completely oblivious to this most basic right afforded by the Fifth and Fourteenth Amendments.

The Commonwealth's Governor[4] obviously wasn't aware of this basic principle. Despite the fact that Grasso had established that he owned the land in the harbor, (Pet. App. 8a), the Department of Environmental Engineering ("DEP")[5] , insisted that he would have to obtain a change in the harbor line by special act of the state legislature in order to build his marina. The special act changing the line was approved by the state legislature; however, "[o]n August 8, 1989, Governor

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[4] Michael Dukakis.

[5] A department within the EOEA. M.G.L. c. 21A, § 7.

Dukakis recommended that the legislation be amended as follows: 'This act shall take effect upon a final written determination by the Department of Environmental Protection that the upgraded wastewater treatment facilities for the city of New Bedford will be sited at a location other than the Standard Times Field site.'

The Governor wrote that he was recommending such language for the following reason:

> [M]y concern has to do with the upland parcels that the bill affects. The upland parcels of land, known as the Standard Times Field, is the proposed alternative site for the upgrading of New Bedford's sewage treatment facilities . . . Should these facilities be required to be located at the Standard Times Field site, this legislation as currently drafted could result in a substantial increase in the cost to New Bedford's ratepayers and the Commonwealth's taxpayers.'

The legislation was amended in the way that the Governor proposed. (Pet. App. 30a-31a). And the officials in the governor's various administrative offices were as equally unaware of this basic principle. While Grasso's various applications were pending before the EOEA, the DEP and the Massachusetts Coastal Zone Management ("MCZM")[6], the Director of MCZM wrote a memo to the Secretary of the EOEA which stated in part: "My opinion is that we should be cautious in the state's support for any private development projects in New Bedford until we have a better sense of where the two treatment facilities will be located. My main interest is for protecting the ratepayers of the city and the taxpayers of the Commonwealth." (Pet. App. 31a). And an internal DEP memo dated August 30, 1989, stated that it 'would be desirable to wait as long as possible before making the determination mentioned in the amendment [the harborline bill]. It is possible that a final decision about the siting won't be made until the spring of next year.' (Pet. App. 31a).[7]

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[6] Also a department within the EOEA. M.G.L. c. 21A, § 4A.

The ignorance regarding the basic requirements of the Fourteenth and Fifth Amendments demonstrated by the local City officials is even more compelling. In New Bedford, it is the eleven member City Council which decides applications to change zoning. (Pet. App. 7a). When the City Councillors requested Governor Dukakis to delay signing the harbor line bill, at least four of them publicly announced that they were opposed to the harbor line legislation because of its potential to increase the value of the property.[8]

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[7] There is an internal memo in April, 1991 from MCZM to the Secretary of the EOEA which explained that the DEP would not "issue the statement" required by the harborline legislation "until all of the acquisition problems are settled for the Fort Rodman site," Pet. App. 11a, which problems, as previously stated, "continued long after the foreclosure" on Grasso's property. (Pet. App. 33a).

[8] City Councilor Ralph Saulnier publicly announced:

> If this bill passes, will the property become more valuable? Does that rise in value then make it impossible for us to afford to take the land if we need it? . . . I think it would be foolish to allow this bill to go any further until we have more information. . . If that plant has to go at the Standard-Times Field, are we going to force the taxpayers of this city to pay more for this property than they should?

(Pet. App. 65a); City Councilor Daniel Hayes publicly stated: "Certainly this bill will enhance the (value of) the Standard-Times Field. We owe it to every concerned party, the mayor, the City Council, to get the best information we can about this legislation," *Id*; City Councilor Nelson Macedo publicly announced that "any site being considered as a back-up site [for the secondary wastewater treatment plant] shouldn't be touched," *Id*; and City Councilor Dorothy Kruger publicly stated (referring to Grasso's first application

Prior the hearing on Grasso's first application to change the zoning, City Councilor Daniel Hayes stated: "I have no problem with the entire parcel, in fact I would like to see it go ahead, but I think we have to wait for the site of the plant, the people in this City will have to pay forever, (a sewer user tax), wherever the plant goes will certainly be hardship cost." (Pet. App. 61a). In referring to this application, City Planner Alfred J. Lima wrote in part:

> An identical petition to rezone this site to a Mixed-Use Business District was heard by the Planning Board on February 17, 1988. At that time the Board referred the petition to the City Council without a recommendation because the selection of a site for a secondary sewage treatment plant had not yet been made. It was then feared that rezoning the site would increase its value in the event that the city would have to acquire the property for the plant. . . .
>
> The development of Standard-Times Field has been held hostage by the prolonged study that led to the selection of Fort Rodman as the site for the treatment plant.

(Pet. App. 7a-8a). This understanding of the course of events on Grasso's first application was publicly affirmed by City Councilor Ralph Saulnier and was consistent with the statements made directly to Grasso by the City Councilors themselves prior to the hearing, who all indicated to him that it was "premature to consider a

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to the City Council to change the zoning of his property) that the City Council delayed the request to rezone the property "after it was decided that it might affect site selection for the proposed sewage treatment plant" and "[t]his particular Senate bill would only add more to our [*sic*]". (Pet. App. 9a).

zone change for the site until the location of the treatment plant was resolved." *Id.* It was also consistent with the statements made to Grasso by the City's mayor, requesting him to delay his development plans while the City considered whether to take his property.[9] (Pet. App. 52a).

Prior to the hearing on Grasso's second application to change the land's zoning, City Councilor Ralph Saulnier publicly stated that he "vehemently opposes any zoning change at the Standard-Times field because it would increase the value of the property" and stated that "the developers are merely trying to get all the necessary permits so they can sell their land at a higher profit." Three days prior to the hearing, the City Council voted that the City communicate to all local, state, and federal authorities "that at this time the City Council would not be supportive of any actions that might minimize or eliminate the use of the Standard-Times Field as a site for the secondary/primary sewage treatment plant for the City of New Bedford.. Pet. App. 10a. At the hearing, Councilor Kruger, one of the few Councillors to speak, stated "this City cannot afford to rezone the Standard Times Field . . . it has been chosen for people's use and it is a well known fact that property taken by eminent domain is done so at fair market value . . . rezoning will only cause an increase in the value of this property." *Id.* After the hearing seven City Councilors indicated to the local newspaper that they opposed the development of Standard Times Field "because they want to build the city's new sewage treatment plant on the land." *Id.*

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[9] The mayor subsequently became a proponent of Grasso's development of his land but only after he had decided that the secondary wastewater treatment plant should be located at Fort Rodman. (Pet. App. 29a, *et. seq.*). Prior to then, he too was publicly opposed to Grasso's development of his property because it would increase its market value. (Pet. App. 24a). And he too, along with members of his administration, also communicated this concern to state officials considering Grasso's state permits. (Pet. App. 54a).

II. THERE IS NOTHING IN LAW OR LOGIC WHICH WOULD PREVENT GOVERNMENT ACTORS TO BE JOINTLY AND VICARIOUSLY LIABLE FOR JUST COMPENSATION UNDER THE FIFTH AMENDMENT WHEN THEY HAVE ACTED IN CONCERT TO EFFECT THE TAKING OF PROPERTY.

This Court has long recognized the principles of joint and vicarious liability for violations of rights guaranteed by the Constitution. This is so even if one of the actors is a private party.

> [W]e have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment. The rule in these cases is the same as that articulated in *Adickes v. S.H. Kress and Company*, 398 U.S. at 152, 90 S.Ct. at 1605-1606 (1970) in the context of an equal protection deprivation.

Lugar v. Edmondson Oil Co., Inc. 457 U.S. 922, 941-942, 102 S.Ct. 2744, 2756 (1982) (citing to "line of cases, beginning with *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820 23 L.Ed.2d 349 (1869)"). See *Wagenmann v. Adams*, 829 F.2d 196, 210 (1st Cir. 1987) (private party held jointly liable with police for false imprisonment and false arrest because he induced police to make arrest for unconstitutional purpose). See also *Archer Gardens, Ltd. v. Brooklyn Ctr. Dev. Corp.*, 468 F.Supp. 609, 613 (1979) (private persons can be held jointly liable with city for constitutional violations through land-use regulations).

There is nothing in law or logic which prohibits joint or vicarious liability of government actors for violations of the "just compensation" clause of the Fifth

Amendment as opposed to other constitutional provisions. At least one United States court of appeals has found no difficulty with doing so. *McKay v. U.S.*, 199 F.3d 1376, 1382-1383 (Fed.Cir. 1999) (U.S. government can be liable for inverse condemnation caused by actions taken by local county board if "it can be reasonably inferred from the evidence that the [U.S.] Government's actions motivated" the board's actions).

The Massachusetts law cited by the Appeals Court does not stand for the proposition that there can not be joint or vicarious liability among government actors for compensation under the Fifth Amendment. *Hamilton v. Conservation Commn. of Orleans*, 12 Mass. App. Ct. 359, 369 (1981); *Municipal Light Co. of Ashburnham v. Commonwealth*, 34 Mass. App. Ct. 162, 170 (1993). In neither of those cases was there even a suggestion that the government advocates were attempting to accomplish an unconstitutional purpose through their advocacy; to wit: to delay the development of private property that the government advocate was considering purchasing. It is the intent with which the government actors acted in this case which implicates them in the unconstitutional deprivation.

III. IT WAS INCONSISTENT WITH THIS COURT'S HOLDING IN *ARLINGTON HEIGHTS V. METROPOLITAN HOUSING CORP.*, 429 U.S. 252 (1977) FOR THE TRIAL COURT AND THE MASSACHUSETTS APPEALS COURT TO FAIL TO CONSIDER THE DIRECT AND SUBSTANTIAL EVIDENCE THAT THE CITY COUNCILORS DENIED GRASSO'S APPLICATION TO REZONE HIS PROPERTY BECAUSE THEY PERCEIVED THAT THE CHANGE WOULD INCREASE THE MARKET VALUE OF HIS LAND AND OTHERWISE FACILITATE HIS DEVELOPMENT OF SAME.

The Appeals Court raised without deciding "whether, for our purposes in analyzing the city's decision, 'we may properly attribute to the city . . . any apparent reasonable ground for its action, at least if that action is not contradicted by facts established on the summary judgment record." (App. 41a). However, in the end, it simply concluded "The summary judgment record contains no insight into the reasoning of the city council ordinance committee ." *Id.*

When he applied for a change in zoning, Grasso had a constitutional right "to be free of arbitrary or irrational zoning actions." *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 263 (1977). Clearly, a purpose to frustrate and hinder the private development of property and to prevent an increase in market value of same while the government is deciding whether to take the property for a public purpose is arbitrary and irrational. *Mahon v. Pennsylvania*, 260 U.S. 393, 415 (1922). When reflecting on the evidence which may be considered when it is alleged that a decision to refuse a change in zoning was motivated by unconstitutional purposes, this Court has stated:

> Determining whether [an unconstitutional purpose] was a motivating factor demands

> a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. . . . The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for [unconstitutional] purposes. See *Lane v. Wilson, supra; Griffin v. School Board,* 377 U.S. 218 (1964); *Davis v. Schnell,* 81 F. Supp. 872 (SD Ala.), *aff'd per curiam,* 336 U.S. 933 (1949); cf. *Keyes v. School Dist. No. 1, Denver Colo., supra,* at 207. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. *Reitman v. Mulkey,* 387 U.S. 369, 373 376 (1967); *Grosjean v. American Press Co.,* 297 U.S. 233, 250 (1936). The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. . . . The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether [unconstitutional] intent existed.

Arlington Heights, supra, 429 U.S. at 266-268.

In addition to the direct evidence of intent in the Councilors' contemporaneous statements, both publicly and to Grasso, the summary judgment record of stipulated facts also shows that the Councilors were subject to considerable pressure from "highly active and influential citizen groups" who did not want the secondary wastewater treatment plant located at Fort Rodman and therefore were adamantly opposed to all of Grasso's efforts to develop his property. (Pet. App. 52a-53a). At the Planning Board hearing on Grasso's first application, the President of the South End Civic Association read into the minutes, on behalf of four hundred residents, a letter opposing the rezoning which argued that a rezoning was premature since the area was under consideration as a site for the secondary sewage treatment plant. The Association pointed out that "premature zoning could cost the City much more to acquire this land if it were selected as the sewage treatment plant site."[10]

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[10] These groups were also very active in their efforts to prevent Grasso from obtaining the state permits he sought. For example, while the harbor line legislation was pending, the Save Fort Rodman Committee wrote to Governor Dukakis asking him to defer signing the legislation stating:

> Fort Rodman and the land affected by [the harborline bill], known as Standard-Times Field, have been chosen by our Mayor as potential sites for a secondary wastewater facility. We feel that both properties should remain status quo, since the sites are currently being considered, reviewed and analyzed by federal and state agencies, and the final decision for the plant has yet to be made. We feel, however, that the owners of the Standard-Times field through enactment of [the harborline bill], have taken action to increase the value of their land. We believe this would place a further burden on the taxpayers of the city of New Bedford if the Standard-Times field is chosen as the site and eminent domain proceedings must be instituted.

(Pet. App. 66a).

And when the City's mayor requested that the EOEA approve de-designation of Grasso's property from the port area regulations "the Save Fort Rodman Committee wrote to the EOEA opposing the City's request to de-designate the Parcel from the port area, stating: "We feel that this designation will increase the value of the land at the Standard-Times Field if the City is required to take said land through an eminent domain proceeding." (Pet. App. 68a).

IV. THE MASSACHUSETTS APPEALS COURT HAS CONSTRUED THE STATUTE OF LIMITATIONS GOVERNING THE ASSERTION OF FIFTH AMENDMENT PROPERTY RIGHTS IN MASSACHUSETTS STATE COURT IN A MANNER PROHIBITED BY *UNITED STATES V. DICKINSON*, 331 U.S. 745 (1947) TO FORCE LANDOWNERS TO ENGAGE IN THE PIECEMEAL AND PREMATURE LITIGATION OF POTENTIALLY UNRIPE CLAIMS AND TO OTHERWISE UNFAIRLY PUT THE BURDEN ON THE LANDOWNER TO DETERMINE THE PRECISE MOMENT A TAKING HAS OCCURRED DURING REGULATORY PROCESSES WHEN THE TAKING HAS BEEN EFFECTED BY A CONTINUING SERIES OF DECISIONS AND ACTIONS TAKEN BY DIVERSE GOVERNMENT ACTORS IN DIFFERENT ONGOING ADMINISTRATIVE AND OTHER PROCEEDINGS.

Massachusetts is required by the Fourteenth and Fifth Amendments to ensure that a "landowner must be able meaningfully to challenge a regulation that allegedly effects a 'taking,' and recover just compensation if it does so. He may not be forced to resort to piecemeal litigation or otherwise unfair procedures in order to receive his due." *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 660 (1981) (Brennan dissent) (citing *United States v. Dickinson*, 331 U.S. at 749). However, the Appeals Court's construction of the state statute would have required Grasso to have done just that.

Grasso was subjected to a continuing barrage of decisions and actions by diverse local and state actors, all intended to delay his development of his property. It was the cumulative effect of this concerted effort on the part of government actors which caused him to lose his financing and his property. (Pet. App. 11a). The Appeals Court's focus on actions taken by the EOEA alone to determine when the statute began to run put on Grasso "the onus of determining the decisive moment in the process of acquisition by the [government] when the fact of taking could no longer be in controversy." *United States v. Dickinson*, 331 U.S. 745, 748 (1947). As the Massachusetts Appeals Court itself notes "The EOEA's actions, however, were ongoing in nature, and it is not apparent in looking to the pleadings whether any singular act, in and of itself, rose to the level of a taking.." (Pet. App. 47a). If the Appeals Court can not make this determination in hindsight, how was Grasso expected to do so at the time? The Appeals Court's "more generous approach . . . looking to the latest action taken by the EOEA regarding the plaintiff's property," Pet. App. 49a, is of no assistance either. In the myriad of proceedings concerning his land, how was Grasso to know which action taken by any of the government actors involved would be the "last" action from which his statute of limitations would to begin to run, particularly when the administrative proceedings continued to pend? It was stipulated by the parties that the controversy over whether his property would be taken for the secondary wastewater treatment plant continued long after he lost the property by foreclosure sale. (Pet. App. 23a and 33a).

The most reasonable construction of M.G.L. c. 79, § 10 under the circumstances which does not run afowl of the issues associated with ripeness and which does not require Grasso to engage in piecemeal litigation or otherwise to guess at his peril "the decisive moment in the process of acquisition by the [government] when the fact of taking could no longer be in controversy" is to determine that the foreclosure sale of Grasso's property was the "act . . . depriving the owner of the use of his property permanently or for a definite period of time" from which the one year to bring suit began. M.G.L. c. 79, § 10. The government's regulatory actions proximately caused him to lose his property permanently. Under M.G.L. c. 79, § 10, the date of that loss is the date from which the statute runs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated:January 28, 2003

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

ORDER

It is hereby Ordered, that the following Application for Further Appellate Review be denied:

FAR-12926

VINCENT GRASSO & others

vs.

CITY OF NEW BEDFORD & another

Bristol Superior Court no. 92-01987
A.C. No. 2000-P-0797

By the Court,

/s/
Susan Mellen, Clerk

ENTERED: October 30, 2002

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

APPEALS COURT NO. 97-P-0509
SUPREME JUDICIAL COURT NO.

ESSEX COUNTY

VINCENT GRASSO, *et. al.*
PLAINTIFFS-APPELLEES

v.

CITY OF NEW BEDFORD, *et. al.*
DEFENDANTS-APPELLANTS

DEFENDANTS-APPELLANTS Application for Leave to Obtain Further Appellate Review under Rule 27.1

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The plaintiffs-appellants ("Grasso") request leave to obtain further appellate review and state as grounds therefor that said review involves substantial reasons affecting the public interest and the interests of justice.

1. **Prior Proceedings.**

The original Complaint was filed on July 8, 1992 and the first Amended Complaint was filed on July 24, 1992 before any responsive pleading was filed. App. v. 1, p. 1, Docket, pp. 9-15, original Complaint, and pp. 16-22, first Amended Complaint. On October 8, 1992, the Commonwealth of Massachusetts ("Commonwealth") filed a Motion to Dismiss under Rule 12(b)(1). App. v.1 p. 29. The Commonwealth argued that the Complaint was not filed within the three years required by M.G.L. c. 79, § 16. App. v. 1, pp. 30-36. At the time, the named defendant was the Executive Office of Environmental Affairs ('EOEA"), not the Commonwealth, and the only allegation "that can be credited to the EOEA" contained no dates. It stated the following:

> So long as Standard Times Field was subject to the screening studies and so long as it was designated the alternate site for the treatment plant, the plaintiffs were not allowed by the defendants to develop the property in a manner incompatible with its potential use as a site for the waste water treatment plant.

Grasso v. City of New Bedford, Memorandum and Order Pursuant to Rule 1:28 ('Memorandum"), p. 31 n. 15.

The Commonwealth's motion was denied. App. v. 1, p. 43. The Commonwealth filed no interlocutory or final appeal from this Order. Thereafter, the Commonwealth filed its Answer. App. v. 1, pp. 44, et.

seq. Subsequently, on August 8, 1994, the EOEA filed a Motion for Judgment on the Pleadings. The EOEA included in its grounds its argument that the complaint was untimely under M.G.L. c. 79, § 16 three year statute of limitations. App. v. 1, pp. 55, et. seq. Before the hearing on the above motion, the plaintiffs filed their Motion to Amend Complaint and their proposed Second Amended Complaint with a request that it be heard at the same time as the hearing on the EOEA's Motion for Judgment on the Pleadings. App. v. 1, p. 108, et. seq. The Second Amended Complaint sought to change the defendant from the EOEA to the Commonwealth and contained substantial detailed allegations relative to actions by Commonwealth actors, including EOEA officers.

The Superior Court judge took no action on the motion to amend and allowed the EOEA's motion. In doing so it improperly "reviewed the allegations contained in all three complaints". "[T]he judge simply addressed some of the allegations contained in the second amended complaint without recognizing that the complaint added defendants or applying the allegations of the second amended complaint to those newly added defendants." Memorandum, p. 30. The judge did not base his decision on the EOEA's statute of limitations grounds. Memorandum, p. 31, n. 16.

The plaintiffs' motion to amend was subsequently allowed "insofar as it amends claims against the City of New Bedford and denied insofar as it seeks to revive claims against Executive office of Environmental Affairs." The Appeals Court construed this to mean "The judge allowed the plaintiffs to amend those claims applying to the city but denied all amendments applicable to claims Against the EOEA." Memorandum, p. 31, n. 14.

Subsequently, the City also filed a motion to dismiss which was also, in part, predicated on an argument that the statute of limitations in M.G.L. c. 79, § 16 had expired. App. v. 1, pp. 252, et. seq. This was also denied. App. v. 2, p. 283.

Thereafter, the City and Grasso filed cross-motions for summary judgment. Memorandum, p. 17, n. 9. The City's motion was allowed and Grasso's motion was denied. App. v. 3, pp. 448 et. seq. A Summary Judgment and Judgment of Dismissal were entered on November 4, 1998. App. v. 3, pp. 480a and 480b.

The plaintiffs filed a Notice of Appeal from both the dismissal and the summary judgment. App. v. 3, p. 481. Neither of the defendants filed a cross-appeal from the denial of the respective motions to dismiss which were predicated on the statute of limitations.

2. Statement of the points with respect to which further appellate review of the decision of the appeals court is sought.

The government actors in this case admittedly used the government's police powers to advance the government's proprietary interests; to wit: they acted in concert to prevent Grasso from developing his land through diverse regulatory proceedings because they wanted to keep his land available for possible use for a secondary wastewater treatment plant. The consideration of the land for such use was pursuant to a consent decree agreed to by both the City of New Bedford ("City") and the Commonwealth of Massachusetts ("Commonwealth"). It is the purpose with which government actors acted in this case and the degree of delay which distinguishes it from the usual regulatory takings case. The Appeals Court decision fails to address these important constitutional distinctions predicated on direct evidence of government purpose and intent which goes to the heart of the rights and protections afforded by the Fifth Amendment of the United States Constitution and Article 10 of the Massachusetts Declaration of Rights. By failing to address these issues, the Appeals Court effectively encourages government actors to continue to openly and contemptuously ignore and abuse the constitutional property rights afforded by the U.S. and Commonwealth Constitutions.

In addition, it is in large measure this failure to adequately consider the constitutional prohibition on the government's purpose for acting to advance its proprietary ends which is the source of the Appeals Court's error in its declination to find joint liability of the defendants.

With respect to the statute of limitations issue, the-Appeals Court decision has the one year statute of limitations contained in M.G.L. c. 79, § 10 commencing and expiring while the various administrative proceedings by which the regulatory taking has been effected continued to pend. To determine that the period for commencing suit relative to administrative proceedings can commence and expire while the underlying administrative proceedings are still pending puts property owners into a catch 22 conundrum which deprives them of their substantive and procedural due process rights.

3. Short statement of the facts relevant to the appeal not including facts correctly stated by the Appeals Court.

1. The defendants had entered into a consent decree together in which they agreed that certain actions relative to building a secondary wastewater treatment plant would be undertaken, including the selection of the appropriate site, under a strict timetable. All decisions and actions by the City, including those relating to the selection of the site, had to be reviewed and approved by the Commonwealth under the consent decree as well as under the Massachusetts Environmental Protection Act ("MEPA"), Chapter 781 of the Acts of 1972, M.G.L. c. 30, §§ 60 62H. App. Vol. 3, p. 367, para. 42 and pp. 449 - 450.

2. The "highly active and influential citizen groups" mentioned at page 6-7 of the Memorandum, opposed all efforts by Grasso to obtain any permits "because they believed that it would increase the cost to the City of taking the Parcel for the treatment plant" App. Vol. 3, p. 450.

3. A majority of the New Bedford City Councilors told Grasso and publicly announced that they were opposed to any private development until the City had finally determined not to place the treatment plant there. In addition to avoiding increased expenses to the City's tax payers, they were aware that the enhanced value development would create would affect the selection process and anger those citizens opposed to Fort Rodman. App. Vol. 3, p. 367, para. 40.

4. All changes in local ordinances, including zoning ordinances, must first be reviewed by the City Council Ordinance Committee, which consists of all eleven members of the City Council. The matter is then referred to the City Council sitting as City Council, for a vote. App. Vol. 3, p. 363, para. 20.

5. Prior to the Planning Board hearing Grasso met with City Councilors and civic leaders, all of whom indicated to him privately and publicly that it was premature to consider a zone change for the site until the location of the treatment plant was resolved. App. Vol. 3, p. 367, para. 40 and p. 374, para. 68. They were all concerned that the zone change would promote Grasso's state permits and otherwise make the property more expensive to take. Id.

6. In later explaining the reasons for the board's action on Grasso's initial application for a zone change, City Planner Alfred J. Lima wrote in part:

> An identical petition to rezone this site to a Mixed-Use Business District was heard by the Planning Board on February 17, 1988. **At that time the**

> **Board referred the petition to the City Council without a recommendation because the selection of a site for a secondary sewage treatment plant had not yet been made. It was then feared that rezoning the site would increase its value in the event that the city would have to acquire the property for the plant. . . .**
>
> **The development of Standard-Times Field has been held hostage by the prolonged study that led to the selection of Fort Rodman as the site for the treatment plant.**

App. Vol. 3, pp. 384 - 385, para. 109 (emphasis added). This understanding was confirmed by City Councilor Ralph Saulnier. App. Vol. 3, p. 386, para. 112.

7. Chapter 597 of the Acts of 1945 expressly permits filling in the harbor beyond the harbor line. App. Vol. 3, pp. 376 - 377, paras. 77 - 79.

8. Concommittant with their various requests to the state and their statements to Grasso and prior to their vote on Grasso's application to rezone, at least three City Council6rs publicly announced that they were opposed to harbor line legislation because of its potential to increase the value of the property. App. v. 3, p. 379, para. 87.

9. City Councilor Ralph Saulnier publicly announced that he would seek to delay or prevent enactment of the harbor line bill because it might increase the value of Standard Times Field. At his initiative, the City Council made a formal request to the state senate to delay action on the harborline bill.

10. City Councilor Nelson Macedo publicly announced that "any site being considered as a back-up site shouldn't be touched." App. v. 3, p. 379, para. 87.

11. City Councilor Dorothy Kruger publicly stated that the City Council delayed the request to rezone the property "after it was decided that it might affect site selection for the proposed sewage treatment plant" and "[t]his particular Senate bill would only add more to our. App. v. 3, p. 379, para. 87.

12. In July 1989, Grasso filed his application for the Chapter 91 license for the dredging and marina with DEP, Wetlands and Wterways [*sic*]. It contained all of the information developed for the DEIR and the additional wetlands and navigation information developed pursuant to the EOEA's scope on the EIR. App. v. 3, p. 379, para. 89. Ex. 53..

13. Grasso continued to conduct extensive engineering studies and planning and have extensive contact with state officials about the permitting issues after the EOEA's scope decision on his DEIR (issued in August 1989). App. v. 3, pp. 376 et seq.

14. In August 1989, Grasso filed a more detailed Chapter 91 Tidelands Report with the EOEA in response to its inquiries in its Certificate on the DEIR about Grasso's prior assertion that the submerged land was private tideland, not commonwealth tidelands. Grasso Aff., p. 381, para. 93.

15. In October 1989, Grasso filed with the DEP its application for a Water Qality [*sic*] Certificate for the dredging. It contained all of the information developed for the DEIR and the additional wetlands and navigation information developed pursuant to the EOEA's scope on the EIR. App. p. 383, para. 101, ex. 61.

16. On or about August 22, 1989, the Director of the Massachusetts Coastal Zone Management ("MCZM") wrote a memo to the Secretary of the EOEA, John DeVillars, which stated in part: "My opinion is that we should be cautious in the state's support for any private development projects in New Bedford until we have a better sense of where the two treatment facilities will be located.

My main interest is for protecting the ratepayers of the city and the taxpayers of the Commonwealth." App. Vol. 3, p. 382, para. 99.

17. City Councilor Ralph Saulnier publicly stated that he "vehemently opposes any zoning change at the Standard-Times field because it would increase the value of the property" and stated that "the developers are merely trying to get all the necessary permits so they can sell their land at a higher profit." App. Vol. 3, p. 386, para. 112.

28. [*sic*] On February 12, 1990, three days prior to the vote on Grasso's rezone petition, the City Council voted that the City communicate to all local, state, and federal authorities "that at this time the City Council would not be supportive of any actions that might minimize or eliminate the use of the Standard-Times Field as a site for the secondary/ primary sewage treatment plant for the City of New Bedford....". It notified the EOEA of the vote on March 12, 1990. App. Vol 3, pp. 387 388, para. 115.

19. The hearing before the City Council Ordinance Committee on the rezoning petition was held on February 15, 1990. At the hearing, Councilor Kruger was reported as stating: "this City cannot afford to rezone the Standard Times Field. She stated that it has been chosen for people's use and it is a well known fact that property taken by eminent domain is done so at fair market value. She stated that rezoning will only cause an increase in the value of this property. App. Vol. 3, p. 388, para. 116.

20. In response to criticism for the vote against rezoning, seven City Councilors indicated to the local newspaper that they opposed the development of Standard Times Field "because they want to build the city's new sewage treatment plant on the land." App. Vol. 3, p. 389 - 390, para. 123.

21. After the hearing on the zone change, a majority of the Councilors defended the denial of the change publicly on the grounds that "they want to

build the city's new sewage treatment plant on the land." App. Vol 3, pp. 389 - 390, para. 123.

22. On April 1, 1991, Jan Smith from MCZM wrote to Susan Tierney, then Secretary of EOEA a memo the situation in New Bedford which stated in part:

> In late December 1990, the Mayor requested Secretary DeVillars to release the Standard-Times site from further consideration as a possible location for the treatment facility in order that the private development proposal could move forward. The Secretary was unable to do this because a legislative mandate delegated this determination to DEP, which has declined to issue the statement until all of the acquisition problems are settled for the Fort Rodman site.

App. Vol. 3, p. 393, para. 138.

23. Unable to obtain permits or any clarity on time parameters for resolution of the controversy over the site Grasso lost the property to a foreclosure sale on August 28, 1991. App. Vol. 3, p. 394, paras. 140 -141.

4. Brief statement, including appropriate authorities, indicating why further appellate review is appropriate.

a. It is a compensable violation of the Fifth Amendment and Article 10 when government actors impose unlawful conditions and requirements on permits for the express purpose of delaying the development of property or otherwise keeping the property available for a possible public use.

It is well settled that the government can not use its police power to advance its proprietary interests. It can not impose unlawful[1] conditions on permits or deny same for the purpose of delaying the development of property or otherwise keeping the land available for a possible public use. The only constitutionally permissible way for the government to keep private property available for such use is to compensate the land owner.

The excessive delays in this case were not "ordinary" or even "unreasonable". The delays here were the deliberate and intended effect of the coordinated effort by government actors, both local and state, to prevent Grasso from developing or otherwise improving his property to keep it available for the treatment plant.

There is a plethora of direct evidence in the form of statements made by responsible state and local government officials, from the governor to the City Councillors, publicly and privately that the purpose for the unlawful conditions and requirements imposed on Grasso's efforts to develop his land was to keep him from increasing its value while the government considered whether to take it or not. Indeed, the attorney for the City argued at the summary judgment hearing that this was the City's purpose and he believed it to be proper and constitutional. Trans./Ex. Vol. 8,- pp. 1625 - 1626 [11 - 12] and 1636-1638 [21 - 23].

That such a purpose is unconstitutional and expressly prohibited by the Fifth Amendment and Article 10 can hardly be disputed.

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[1] There were numerous unlawful conditions or requirements imposed on Grasso's permits by government regulators. It is beyond the scope of the limited parameters of this application to detail them herein; however, if allowed, Grasso will detail these in a subsequent brief if the application is allowed.

The Fifth Amendment states in relevant part:

> No person shall be . . . deprived of property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Supreme Court has long recognized the temptation for government officials to exercise their police power authority over private land in order to evade the government's constitutional obligation to pay "just" compensation for property needed for "public use." *Mahon v. Pennsylvania,* 260 U.S., 393, 415, 43 S.Ct., 158, 160 (1922). As a consequence, the Supreme Court has consistently held that "the Fifth Amendment is violated whenever land-use regulation 'does not substantially advance legitimate state interests **or** denies an owner economically viable use of his land.'" *Lucas v. South Carolina Coastal Council,* 112 S.Ct. 2886, 2894 (1992) quoting *Agins v. Tiburon* 447 U.S. 255, 26C, 100 S.Ct. at 2141 (original emphasis removed, emphasis added).

The use of the disjunctive "or" makes it clear that either ground alone constitutes a violation of the Fifth Amendment.

It is clear that compensation is required whenever regulatory action has as its purpose the "avoidance of the compensation requirement [of the Fifth Amendment], rather than the stated police-power objective" of the land-use regulation. *Steinbergh v. Cambridge,* 413 Mass. 736, 745, n. 9 quoting *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 841 (1987). In *Steinbergh*. the court stated that "[t]he planitiffs **make an entirely separate takings argument** based on the principle that a taking occurs when a land-use regulation 'does not substantially advance legitimate state interests.'" *Steinbergh v. Cambridge,* 413 Mass. at 744 (quoting *Agins v. Tiburon* 447 U.S. 255, 260, 100 S.Ct. at 2141 (1980) (emphasis added)).

This standard is the same whether the government is acting on applications for "regulatory approvals or changes it local ordinances and by-laws". *Steinbergh v. Cambridge* 413 Mass 736, 743 (1992).[2]

With respect to proof of unconstitutional purpose;

> There can be no presumption of the validity of legislative action which is expressly predicated only on facts which if true establish the invalidity of what is done. Compare Caires v. Building Commissioner of Hingham, 323 Mass. 589, 594; Raymond v. Commissioner of Public Works of Lowell, 333 Mass. 410, 414; Cohen v. Lynn, 333 Mass. 699, 705. The board is not helped by any rule as to burden of proof. A decision stating facts which appear adequate to support the action taken would stand in materially different aspect. It is a different case also if the statute does not call for a statement of reasons as a part of the decision but the evidence shows that some of those voting may have been moved by factors which would be insufficient or invalid reasons for a zoning enactment. Compare Simon v.

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[2] Although there is no decision directly on point in Massachusetts, there are a substantial number of authorities from other jurisdictions which have held that actions by the government to deliberately affect the value of private property in furtherance of a proposed public project are compensable violations of the U.S. or state constitutions. See Orlando/Orange County Expressway Authority v. W & F Agri growthFernfield, Ltd., 582 So.2d 790, 792, review den S91 So.2d 183 (1991); Sparks v. Armstrong, 748 P.2d 7, 8 (Nev. 1987); Re Virginia Park, 121 Mich.App. 153, 328 N.W.2d 602 (1982); Commonwealth, Dept. of Transp. v. Lawton, 412 A.2d 214 (Pa. 1980) Board of Education v. Clarke, 280 N.W.2d 574, 577 (1979).

> Needham, 311 Mass.560; Caires v. Building Commissioner of Hingham, 323 Mass. 589, 596; Raymond v. Commissioner of Public Works of Lowell, 333 Mass. 410, 412.

Mary E. McHugh v. Board of Zoning Adjustment of Boston, 336 Mass. 682, 690-691 (1958).

b. It was the cumulative and concerted actions of both the state and City actors, both of whom acted for the same purpose, which caused Grasso to eventually lose his property.

The Appeals Court exonerated both defendants from a large part of their respective responsibilities for Grasso's injury by failing to recognize the significance of the shared unconstitutional purpose with which they both acted.

The Appeals Court found that the City could not be held jointly liable for the actions of state actors because the City "had no decision, making power with regard to those issues in the control of the Commonwealth." Memorandum, p. 22, n. 11, para. 3. However, what distinguishes the present action from that in the Massachusetts decisions relied upon by the Appeals Court at pages 20-23 of its Memorandum[3] is that in neither of those cases was there even a suggestion that the government advocates were attempting to accomplish an unconstitutional purpose through their advocacy; to wit: to delay the development of private property that the government advocate was considering purchasing. Indeed, consideration of the Commonwealth's good faith in *Ashburnham v. Commonwealth* would have been

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[4]. [*sic*] [3] *Hamilton v. Conservation Commn. of Orleans,* 12 Mass.App. 359, 369 (1981); *Municipal Light Co. of Ashburnham v. Commonwealth,* 34 Mass.App. 162, 170 (1993). of same.

pointless if the Commonwealth could not have been liable irrespective. In the present action, the state shared the City's intent and willingly exercised its authority in the manner requested to further that purpose.

Moreover, in this case, both the City and the Commonwealth had agreed to a consent decree in which part of their agreement dealt with the disposition of Grasso's land and both participated in the decision making process as to whether the City would take the land or not. The Commonwealth had a vested interest in promoting the City's unconstitutional purpose of keeping the land available while the decision-making process pended.

The City is liable under the ordinary principles of joint liability which have long been recognized for constitutional violations. The rule in these cases is the same as that articulated in *Adickes v. S.H. Kress and Company*, 398 U.S. at 152, 90 S.Ct. at 1605-1606 (1970) in the context of an equal protection deprivation." *Lugar v. Edmondson Oil .Co.*, Inc. 457 U.S. 922, 941-942, 102 S.Ct. 2744, 2756 (1982) (citing the "line of cases, beginning with *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820 23 L.Ed.2d 349 (1869)"). See *Wagerimann v. Adams*, 829 F.2d 196, 210 (1st.Cir. 1987) (private party held statements private party held jointly liable with police for false imprisonment and false arrest because he induced police to make arrest for unconstitutional purpose). See *Archer Gardens, Ltd. v. Brooklyn Ctr. Dev.* Corp., 468 F.Supp. 609, 613 (1979) (private persons can be held jointly liable with city for constitutional violations through land-use regulations).[4]

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[4] The Appeals Court distinguished between the present action and that in Archer Gardens by noting that in Archer Gardens, the private developer was an "integral component in implementing the [urban renewal] plan and negotiating the purchase of the property." Memorandum, p. 22, n. 11. However, the City likewise is a potential purchaser of Grasso's property and

C. The statute of limitations for seeking relief for a regulatory taking can not expire while the administrative proceedings continue to pend.

As the Appeals Court observes, the issue of exhaustion of administrative remedies is highly relevant to any regulatory takings claim. Memorandum, p. 18, n. 10. "Whether a particular governmental action amounts to a taking requires an examination of the character of the governmental action as well as the nature and extent of the governmental interference with the owners' rights in the property as a whole." *Wilson v. Commonwealth,* 31 Mass.App. 757, 765 (1992). Indeed, the Appeals Court notes that the trial court determined that some of Grasso's claims had not yet ripened "because the plaintiffs failed to exhaust administrative remedies." Memorandum, p. 18, n. 10. It is clearly violative of substantive and procedural due process rights to hold both that claims may be unripe for review by the courts and at the same time hold that the statute of limitations has commenced and expired for bringing such claims.

Quoting *United States v. Gypsum Co. v. Mystic River Bridge Authy,* 329 Mass. 130, 141 (1952), the Appeals Court states that "[t]he critical point occurs when the 'landowner has actually parted with his property or its possession or some interest therein." Memorandum, p. 33. Such a definitive point should not be held to occur by some administrative action while the administrative process continues to pend. Either some definitive cessation or termination of the administrative process should be required, thereby definitively notifying the property owner of his appellate rights, or some other permanent or

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both the City and the Commonwealth were jointly interested in implementing the terms of the consent decree they had entered into.

definitive loss must occur for the statute to commence.

It is difficult to perceive why Grasso's permanent loss should be considered any differently than the permanent loss suffered in *Wilson v. Commonwealth*, 31 Mass.App. 757, 413 Mass. 352 (1992) when, while a MEPA process pended, the "ocean overran the plaintiffs' homes" *Id.* at 762. In both cases, the permanent loss was proximately caused by agency delay.

> Generally, courts have rejected claims that because an agency did not act more quickly on an application, a State or Sate agency took a landowner' ' [*sic*] property (Citations omitted). These cases, however, have involved claims of temporary takings of property in circumstances in which the property was not totally deprived of its value, while we are concerned here with the alleged total destruction of property due to agency delay. . . . We agree with the Appeals Court that the plaintiffs' taking claims do not fail in all respects simply because the administrative process was not completed before the properties were made worthless. See Wilson v. Commonwealth, 31 Mass.App.Ct. 757, 766-767 (1992). Unreasonable agency delay itself would be the basis for the failure to complete the agency proceeding and allegedly would be the cause of the taking. It would be illogical to permit the agency's own alleged dilatory practices to justify the dismissal of the taking claim for the reason, asserted by the Commonwealth, that departmental proceedings were not completed."

Wilson v. Commonwealth, 413 Mass. 352, 355-356 (1992). The fact that the delays here were intentional does not alter the fact that prior to litigation there existed no formal, definitive termination of the administrative processes. And even if it did, because the agency actions were unlawful and excessive, Grasso should still have the right to pursue his claim under *Wilson v. Commonwealth* for the total loss of his property since his Complaint was filed within one year of that event.

Respectfully submitted,
Plaintiffs-Appellants
By their attorneys,

/s/
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CERTIFICATE OF SERVICE

I, Philip H. Cahalin, certify that the defendants-appellees have been served the above by mailing a copy of same to Arthur Caron, Esq., City of New Bedford Law Department, 133 William Street, New Bedford, MA 02748 and Stephen Dick, Esq., Office of the Attorney General - Trial Division, 200 Portland Street, Boston, MA 02114 this 2nd day of October. 2000.

Signed under the pains and penalties of perjury this 2nd day of October, 2002.

/s/
Philip H. Cahalin, BBO #545538
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ADDENDUM

Memorandum and Order Pursuant to Rule 1:28

Memorandum of Decision and Order on Cross-Motions for Summary Judgment

APPENDIX C

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston,

In the case no. 00-P-797

VINCENT GRASSO & others

vs.

CITY OF NEW BEDFORD & another.

Pending in the Superior Court for the County of Bristol

Ordered, that the following entry be made in the docket:

Judgments affirmed.

NOTE:

The original of the within rescript
Will issue in due course, pursuant
To M.R.A.P.23

APPEALS COURT

By the Court,

/s/ ____________________, Clerk
First Assistant
Date September 12, 2002.

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

00-P-797

VINCENT GRASSO & others[1]

vs.

CITY OF NEW BEDFORD & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiffs' claim that the city of New Bedford (city) and the Executive Office of Environmental Affairs (EOEA) made a taking of their property on the New Bedford waterfront through regulatory actions and inactions associated with the permitting of that property for development. The claims against the city and the claims against the EOEA were disposed of in separate proceedings and by separate judges. Final judgments in favor of each defendant then entered dismissing the plaintiffs, complaint.

The claims against the EOEA were dismissed pursuant to a motion for judgment on the pleadings by a judge of the Superior Court, who filed an eight page memorandum of decision. A. I:220. A motion of the city for summary judgment was allowed by a different judge, who filed a thirty-three page memorandum of decision. (A. III:448) We will quote extensively from this memorandum.

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[1] Palmers Cove Limited Partnership, Old New Bedford Waterfront Corp., and Robert P. Regan.

[2] Executive Office of Environmental Affairs.

I. Facts.[3] The plaintiffs Vincent Grasso and Robert Regan created a corporation to pursue a development venture and called it the Old New Bedford Waterfront Corp. (ONBW). They purchased a vacant waterfront parcel of land known as Standard Times Field (parcel) from Palmer's Island Corporation for $2.7 million. "The parcel consists of upland,, which is bounded by New Bedford Harbor, and submerged land,' which runs under the harbor to Palmer's Island. The plaintiffs intended to develop the parcel, which was zoned as an 'Industrial B' district, as a marina and waterfront park. They also considered the possibility of developing the upland with condominiums, which would require a zoning change to a 'Mixed Use' district since residential uses are not permitted in an 'Industrial B' zone. . . . The plaintiffs anticipated permitting for all uses to be completed within two years of their purchase of the parcel. (A. III:449)

"Pursuant to the [F]ederal Clean Waters Act, the city was required to upgrade its Fort Rodman wastewater treatment plant to meet [F]ederal secondary treatment effluent limitations. To accomplish this, the city needed to construct a secondary wastewater treatment plant to work in tandem with the Fort Rodman plant. Federal funds were available to the city to study, plan, and build the secondary plant, but not to purchase or take by eminent domain private land on which to locate it." (A. III:449-450 [footnotes omitted])

"[O]n February 2, 1987, the city filed an environmental notification form ('ENF') with EOEA, the agency responsible for implementing the Massachusetts Environmental Protection Act

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[3] For a full recitation of the facts, including further detail regarding the statements of certain State and city officials, see A. III:448-480.

('MEPA'), G. L. c. 20, §§ 61-62H. The city's ENF identified four possible locations for the secondary wastewater treatment plant. One of the alternative locations was the upland portion of the parcel; another involved expansion of the existing Fort Rodman plant onto adjacent property.

"The city's mayor, John Bullard, publicly opposed the development of the tidelands portion of the parcel with a marina because it would make it more costly for the city to acquire the upland for a secondary wastewater treatment plant in the event that the upland were to be chosen as the site for the plant. In April of 1987, Mayor Bullard informed ONBW that the city was considering the parcel as a potential location for its secondary wastewater treatment plant and requested that it delay development plans until the completion of the plant selection process." (A. III:450)

"On August 27, 1987, ONBW filed an ENF for its waterfront park project with the EOEA.[4] The ENF described plans to construct a marina, harbor master's house, public boardwalk along the water's edge, two restaurants, a fifty room guest inn, 10,000 gross square feet of marine-related and commercial retail space, and 10,000 gross square feet of neighborhood retail space on the parcel." (A. III:451)

Thereafter, both the mayor and the city's environmental planner wrote letters to the EOEA expressing their concerns, and general disapproval, regarding the plaintiffs' proposed development and its potential effects on the placement of the wastewater treatment plant.

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[4] "Under MEPA, before any State agency can issue a permit for a proposed development project, the EOEA must determine, after consulting with all interested parties, whether a comprehensive environmental impact report ['EIR'] is required, and, if so, must determine the form, content, level of detail, and alternatives required for the report and must limit the scope of the report to those issues which, by the nature and the location of the project, are likely to cause damage to the environment, and, if no financial assistance from the agency is sought, to those issues which are within the subject matter jurisdiction of the permit. Villages Dev. Co. v. Secretary of the Executive Office of Envt. Affairs, 410 Mass. 100, 102 (1991), citing G. L. c. 30, § 62A; 301 Code Mass. Regs. § 11.06."

"On October 13, 1987, pursuant to MEPA, EOEA issued a certificate requiring ONBW to prepare an environmental impact report [EIR] for the waterfront park project. The certificate stated:

> 'There is disagreement whether this project, taken alone, constitutes segmentation, pursuant to 301 CMR 11.16. The pertinent facts, regarding the issue are as follows:
>
> '*the project described in the ENF . . . does have independent utility;
>
> '* on the other hand, the project could potentially preclude or affect the choice of alternatives or mitigation for the remaining 22.acre parcel, because of the loss of direct access to the waterfront.
>
> 'The importance of an analysis of alternative uses for the site has been clearly demonstrated. This site is in a Designated Port Area (DPA); however, the project proposal is inconsistent with the marine industrial designation. Moreover, this site is being actively considered by the city of New Bedford for a secondary wastewater treatment plant.
>
> 'Based on these facts, it will be important to evaluate the potential effects from the entire project. A review process will be established whereby the draft EIR is a planning document for the entire site. When the public review of the draft has been satisfied, it will be possible

for the proponent to proceed with a final EIR for the discrete phases of the entire project.'

"The certificate thus required the scope of the EIR to include: (1) The 'Preferred Alternative, as described in the ENF,[5] and including the residential component for the 22 acre site'; (2) 'A Maritime-dependent Industrial Project Alternative, which is consistent with the State's Designated Port Area policies'; (3) 'A Secondary Treatment Plant Alternative should be presented, based on the site assessment study that is being prepared for the City of New Bedford'; and (4) 'Additional Alternatives that are a combination of elements of alternatives 1 and 2, and alternatives 1 and 3.'

"With respect to the residential component for the 22 acre site, the certificate noted that 'in order for this proposal to proceed, a local zoning change will be necessary,' a proposition that was undisputedly accurate. Nothing in the certificate required that the zoning change actually be obtained prior to completion of the EIR, or stated that EOEA approval would not be forthcoming for the marina were condominiums not permitted to be built on the upland. Indeed, the language describing additional alternatives' makes it clear that ultimate approval of the marina was not tied to rezoning; EOEA pointed out that, at the scoping session, a representative of EPA had observed that a waterfront park and marina are not necessarily incompatible with industrial uses. The plaintiffs chose not to challenge the validity of any part of the certificate." (A. III:453-454)

"On December 4, 1987, ONBW filed an application with the city council to amend the zoning of the parcel from Industrial B to Mixed-Use

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[5] It appears that the "Preferred Alternative, as described in the ENF" refers to the plaintiffs' preferred development plan for the parcel, which was described in the ENF as including "residential [units] with related amenities."

Business in order to permit the condominium project. New Bedford's planning board ('board') was required to review the petition and make a non-binding, advisory recommendation to the city council ordinance committee." (A. III:455)

The New Bedford city planner, the board chairman and the president of the South End Civic Association (representing approximately 400 residents) all expressed disapproval of the plaintiffs' requested zoning change.

"The city council ordinance committee held a public hearing on ONBW's petition on March 17, 1988. At this time, ONBW withdrew its petition and promised to work cooperatively with the city until the wastewater treatment plant siting decision was made, but requested that the council do whatever it could to speed up the siting process. ONBW did not commence a suit challenging the validity of the Industrial B zoning classification as applied to the parcel.

"Thereafter, in June of 1988, ONBW submitted its draft EIR to the EOEA, with copies provided to various city officials, including the planning department." (A. III:456-457 [footnote omitted]) In August, the city's environmental planner wrote a letter to the EOEA widely criticizing the draft EIR for failing to fully address the property's possible use as a site for the wastewater treatment plant.

"The following week, on August 19, 1988, the EOEA issued its certification stating that the draft EIR complied with MEPA and its implementing regulations. It noted, however, as follows:

> 'The alternatives analysis . . . is a missed opportunity. The discussions in the draft EIR lead to the conclusion that the proposed project is superior to other possible alternatives. At this stage of the review these conclusory discussions are premature. Since alternatives have been

> deemed unrealistic, impact analyses have been dismissed, leaving reviewers at somewhat of a loss, particularly since the site is being actively considered for public projects.
>
> 'This approach could interfere with creative solutions to conflicting interests for the development of the Palmer's Cove site. The final EIR should take into account the serious comments on the alternatives analysis and should be more forthcoming in the analysis of site options. For example, even if the proponent is not interested in a mixed use proposal, such as a waterfront park/marina and wastewater treatment plant, the final EIR should evaluate the potential for and impacts of such a mixed development.'

"The certificate also found no meaningful assessment of the issues relating to the parcel being part of a designated port area. EOEA observed that even though the site had been vacant for many years, the potential for future uses could not be written off, noting that at least two water related industrial uses at the site were being contemplated, namely the wastewater treatment plant and a disposal site for contaminated dredging materials. The certificate also raised several questions which were required to be answered in the final EIR concerning the plaintiffs, dredging plans. Once again, the plaintiffs did not mount a legal challenge to EOEA's requirement that the final EIR contain an analysis of site options for the entire parcel or to anything else contained in the certificate.

"From August until December 1988, ONBW met with State and city officials to discuss the requirements of the final EIR. ONBW learned at these meetings that condominiums could only be allowed on the upland if that property were 'de-designated' from the New Bedford/Fairhaven Port Area, and that only the city could apply for such a de-designation.[6] When ONBW emphasized that it wanted to proceed with only the marina portion of the project, EOEA advised that the marina was ineligible for a chapter 91 license because it would extend beyond the New Bedford Harbor line.[7]

"To remedy the chapter 91 problem, ONBW petitioned the Legislature to alter the boundary of the New Bedford Harbor line. The New Bedford Chamber of Commerce, the publisher of the Standard-Times, the New Bedford Harbor Development Commission, the Mayor's Economic Development office, and city councilor James Sullivan wrote letters to the Legislature supporting legislation that would accomplish what ONBW was seeking." (A. III:457-459) It was apparent, however, that several members of the city council adamantly opposed the legislation because it would increase the value of the property and force the city to spend more money if it subsequently needed to acquire the parcel.

"On February 20, 1989, Mayor Bullard publicly announced that he had selected Fort Rodman as the site for the secondary wastewater treatment plant. However, city council approval was needed to raise the taxes to fund the plant, remove [F]ederal deed restrictions on the land containing Fort Rodman, and approve the local permits needed for construction of the plant." (A. III:459)

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[6] "There is no evidence that the advice given to ONBW regarding the necessity of de-designation was given in bad faith. ONEW at no time sought declaratory relief with respect to the necessity of de-designation."

[7] "G. L. c. 91, the Waterways Permit and License Program, is designated to protect the Commonwealth's interest in navigable waters. Under c. 91, a license from the [Department of Environmental Protection] is required for any construction or filling activity in or over tide waters below the high water mark. See c. 91, §§ 14-18."

"In July of 1989, ONBW filed a notice of intent with the New Bedford conservation commission and an application with the DEP Wetlands and Waterways Division for a chapter 91 license for dredging and the construction of a marina, boat slips, fueling station and a travel lift pier." (A. III:459)

At about this time, the Legislature recommended a bill to then Governor Dukakis that would have amended the harbor line pursuant to the plaintiffs, request. Nine New Bedford city councilors wrote to the Governor asking him to delay any decision regarding the harbor line "until the committee on natural resources could conduct an advertised public hearing in New Bedford and the city council had the opportunity to formally take a position on the legislation." (A. III:460) The letter did not mention the potential increase in cost to the city should eminent domain proceedings be instituted.

"On August 81 1989, Governor Dukakis recommended that the legislation be amended as follows: 'This act shall take effect upon a final written determination by the Department of Environmental Protection that the upgraded wastewater treatment facilities for the city of New Bedford will be sited at a location other than the Standard Times Field site.' The Governor stated that he was recommending such language for the following reasons:

> '[M]y concern has to do with the upland parcels that the bill affects. The upland parcels of land, known as the Standard Times Field, is the proposed alternative site for the upgrading of New Bedford's sewage treatment facilities. . . . Should these facilities be required to be located at the Standard Times Field site, this legislation as currently drafted could result in a substantial increase in the cost to New Bedford's ratepayers and the Commonwealth's taxpayers.'

The legislation was amended in the way that the Governor proposed.

"On August 22, 1989, the New Bedford conservation commission issued an order of conditions to ONBW for the dredging and construction of the marina. DEP's Wetlands and Waterways Division did not take jurisdiction of the order of conditions. The same day, the director of Massachusetts Coastal Zone Management wrote a memorandum to the EOEA stating that 'we should be cautious in the State's support for any private development projects in New Bedford until we have a better sense of where the two treatment facilities will be located. My main interest is for protecting the ratepayers of the city and the taxpayers of the Commonwealth.' An internal DEP memo dated August 30, 1989 stated that it 'would be desirable to wait as long as possible before making the determination mentioned in the amendment [to Senate Bill 1131]. It is possible that a final decision about the siting won't be made until the spring of next year.'

"In October of 1989, ONBW filed an application with DEP for a water quality certificate for dredging. On October 24, 1989, city councilor Ralph Saulnier wrote to the EOFA, reminding it that the city had not yet made any decision about the site for the wastewater treatment plant because the city council had not endorsed the mayor's selection." (A. III:460-461)

"On December 26, 1989, Mayor Bullard wrote to the EOEA requesting, on behalf of the city of New Bedford, the de-designation of the parcel from the New Bedford-Fairhaven Designated Port Area.

"In January of 1990, ONBW once again filed a petition with the city council to rezone the parcel known as the Standard-Times Field from Industrial B to a Mixed-Use Business District. The planning board held a public hearing on February 6, 1990, during which Mayor Bullard and city planner Alfred Lima recommended approval of the petition. The chairwoman of the Save Fort Rodman Committee and city councilor Ralph Saulnier spoke in opposition to the petition. The planning board voted unanimously to recommend approval of the petition.

"On February 2, 1990, the mayor again requested that EOEA approve de-designation." (A. III:461-462)

"On February 15, 1990, the city council ordinance committee held a hearing on ONBW's rezoning petition. After denying a continuance sought by ONBW, the committee voted eight to two against the rezoning.

"On February 20, 1990, EOEA ruled on the city's request for de-designation by stating that, pursuant to MEPA, such a request required the preparation of an EIR.

"Thereafter, on March 5, 1990, the EOEA rejected the city's facility plan for the secondary wastewater treatment plant as incomplete, stating that it failed to comply with MEPA, in part, because it failed to adequately delineate proposed mitigation of community impacts at Fort Rodman. By letter dated March 12, 1990, the New Bedford city council notified the EOEA that it 'would not be supportive of any actions that might minimize or eliminate the use of the Standard-Times Field as a site for the secondary/primary sewage treatment plant for the city of New Bedford.'

"In April of 1990, Mayor Bullard challenged the city council to vote on a final site for the treatment plant. A simple majority of six votes was needed to choose a site, while eight votes were needed to lift the deed restrictions on Fort Rodman. Meanwhile, on April 11, 1990, the bank notified ONBW that it was in default on its loan for the parcel. On May 1, 1990, the city council voted six to five to approve the ranking of the Fort Rodman site first and the Standard Times Field second for the siting of the secondary wastewater treatment plant.

"The following day, the Standard-Times reported City Councilor Saulnier as stating that he intended to use deed restrictions on the Fort Rodham land to block constructing the plant there. The bank sent ONBW a notice of intent to foreclose on September 27, 1990, and, on October 19, 1990, ONBW filed for Chapter 11 bankruptcy, temporarily staying the foreclosure. On November 26, 1990, EOEA issued its certificate on the city's supplemental final environmental impact report, stating that 'several outstanding issues remain . . . including the relocation of existing facilities at Fort Rodman.'

"The bank foreclosed on the parcel on August 28, 1991, with ONBW owing substantial deficiencies. The controversy over the siting of the wastewater treatment plant continued long after the foreclosure." (A. III:462-463)

II. Analysis. The plaintiffs' action alleges that the concerted actions of the city and the EOEA with respect to the parcel constituted a "taking" in violation of the Fifth and Fourteenth Amendments of the United States Constitution and art. 10 of the Massachusetts Declaration of Rights.[8] There never was an order of taking pertaining to the parcel. The city did not physically occupy or invade the plaintiffs' land or otherwise cause any physical injury to the parcel. Rather, the plaintiffs contend that the city and EOEA effected a "regulatory taking" by "persistently denying and conditioning permits" and refusing to allow "changes in land-use regulations."

A. Regulatory taking principles. A "[l]and-use regulation does not effect a taking if it substantially advances legitimate state interests, and does not deny an owner economically viable use of his land.'" Nollan v. California Coastal Commn., 483 U.S.

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[8] In the past we have not recognized differing standards under the "takings" clause of the two constitutions and the plaintiffs have advanced no argument that we should create more favorable principles than those developed under Federal law.

825, 834 (1987), quoting from Agins v. Tiburon, 447 U.S. 255, 260 (1980). See Lopes v. Peabody, 417 Mass. 299, 304-305 & n.9 (1994); Greenfield County Estates Tenants Assn., Inc. v. Deep, 423 Mass. 81, 86 (1996).

The test applied in determining whether a particular regulation or zoning provision substantially advances a legitimate State interest is not one of strict necessity. Steinbergh v. Cambridge, 413 Mass. 736, 746 (1992). Rather, all that is required to support the necessary "'essential nexus' between 'the State's interest and its chosen means'" is "a 'logical and sufficiently well-founded approach to dealing' with the problem" faced by the city. Id. at 737, quoting from Esposito v. South Carolina Coastal Council, 939 F.2d 165, 169 (4th Cir. 1991), cert. denied, 112 S.Ct. 3027 (1992).

In Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), the Supreme Court established the categorical rule (stated as the second prong of the above test) that a taking has occurred when a regulation deprives an owner of all economically beneficial uses of his land. Id. at 1019. The Court recently iterated that the holding of Lucas "was limited to the extraordinary circumstance when no productive or economically beneficial use of land is permitted." Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S.Ct. 1465, 1483 (2002) (emphasis original). This "categorical rule would not apply if the diminution in value were 95% instead of 100%." Ibid. In Massachusetts the Lucas principle has been stated as applying in cases where the regulation "deprives the plaintiffs' land of all practical value to them or to anyone acquiring it, leaving them only with the burden of paying taxes on it." MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 641 (1970). In making our review we regard the property as a whole. "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." Moskow v. Commissioner of Envtl. Mgmt., 384 Mass. 530, 533 (1981), quoting from Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-131 (1978). "Rather, the proper focus is on the character of the action and the nature of the interference with the rights in the property as a whole." Daddario v. Cape Cod Commn., 425 Mass. 411, 416 (1997).

If the regulation survives this first level of review, then its economic effect must be evaluated. In doing so we perform a balancing test using criteria which have been named the "Penn Central factors" after the United States Supreme Court decision in which they were announced. Penn Central Transp. Co. v. New York City, supra at 124-125, 130-131. Daddario v. Cape Cod Commn., supra at 415-416. Those factors are: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action." Id. at 416, quoting from Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986). Penn Central Transp. Co. v. New York City, supra. Again, we view the property as a whole.

At each turn in the analysis, the landowner maintains the burden of establishing that the actions taken are unconstitutional. Lopes v. Peabody, 417 Mass. at 307 n.13.

B. Motion for summary judgment.[9] In reviewing a grant of summary judgment we ask "whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991).

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[9] Contrary to the city's contention on appeal, this was a summary judgment motion and not a jury-waived trial. Both parties submitted motions and entitled those motions "motion for summary judgment." The judge's decision was titled "Memorandum and Order on Cross-Motions for Summary Judgment." She utilized the summary judgment standard and decided the matter on such grounds.

The motion judge began her analysis by addressing whether the city's actions substantially advanced a legitimate land use interest.[10] The acts challenged by the plaintiffs may be divided into two categories. The first comprises those acts through which, the plaintiffs argue, the city induced the Commonwealth (the EOEA, the Legislature, and the Governor) to make certain decisions adversely affecting ONBW's parcel. Those acts include inducing the EOEA to impose an unduly burdensome scope on the EIR for the marina project; inducing the EOZA to condition ONBW's State and Federal permits for the marina project on the rezoning of the parcel as well as on the de-designation of the site as a port area and on the change in the harbor line; and inducing the Governor to condition the harbor line change on the parcel's not being chosen as a site for the city's treatment plant. The second category comprises those actions for which the city was directly responsible. This category includes only the city's denial of ONBW's position to rezone the parcel from industrial B to mixed-use business.

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[10] Although the motion judge reached the merits of the plaintiffs, arguments below, she also noted that some of those arguments were not ripe because the plaintiffs failed to exhaust administrative remedies. "The Supreme Court has consistently declined to consider unripe takings claims. The ripeness doctrine provides that 'a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.'" Daddario v. Cape Cod Commn., 425 Mass. at 414, quoting from Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 186 (1986) (other citations omitted). An essential prerequisite to the assertion of a regulatory takings claim is a final and authoritative determination from which a court can determine whether a regulation has gone "too far." Daddario v. Cape Cod Commn., supra at 415. There are, however, recognized exceptions to this rule. Wilson v. Commonwealth, 31 Mass. App. Ct. 757, 766, S.C., 413 Mass. 352 (1992).

The plaintiffs no longer own the parcel and no longer seek to develop it at all. Wilson v. Commonwealth, 31 Mass. App. Ct. at 766. We are confident that the governmental regulations are sufficiently well defined for us to determine whether any reached the magnitude of a compensable taking. "When exhaustion is not statutorily mandated, the decision to require it in a given case is a matter of sound judicial discretion." Id. at 767. Accordingly, we decline to dismiss any of the plaintiffs, claims on this basis.

1. Actions inducing decisions by the EOEA, Legislature, and Governor. The motion judge recognized that in order to hold the city responsible for those decisions resting in the control of the EOEA, the DEP, the Legislature, or the Governor, the plaintiffs needed to prove that those decisions were not only affected by the city's influence, but also that the city could be held liable in a takings action on those grounds. Although there is certainly enough evidence to suggest that the city advocated for the steps taken by the EOEA, the Legislature, and the Governor, the city cannot be held liable in a takings action for publicly urging the Commonwealth's agencies and officials to pursue a particular course of action.

In somewhat similar circumstances we have said that where a statute confers upon a State agency the power to condition or preclude the development of private property for environmental reasons, the Commonwealth, not the city, "is the party which would bear the liability for any taking which results." Hamilton v. Conservation Commn. of Orleans, 12 Mass. App. Ct. 359, 369 (1981). We concluded that the city could not be held liable despite that it had lobbied the State agency to reach the eventual outcome of prohibiting development on the subject property. We found it significant in Hamilton that the relevant statute, G. L. c. 131, § 40, "reserves to the [State agency] the power to make the final decision on applications involving the specified concerns and to preserve thereby the Statewide interest in the protection of our wetlands." Id. at 368.

In another regulatory taking action we concluded that the Commonwealth could not be held liable for urging Federal agencies to take certain actions damaging the plaintiffs' economic interests in its property. Municipal Light Co. of Ashburnham v. Commonwealth, 34 Mass. App. Ct. 162, 170 (1993). In Municipal Light Co. of Ashburnham, the plaintiffs sued the Commonwealth for making a de facto taking of property without just compensation. Id. at 163. The plaintiffs complained that the Commonwealth delayed the opening of the Seabrook Nuclear Power Plant several years by persistently raising safety questions and, thereby, "imped[ing] the licensure of Seabrook by the United States Nuclear Regulatory Commission." Id. at 165. We determined that because the Commonwealth "has not regulated and cannot regulate Seabrook," its activities as "an advocate before those Federal agencies which can and do regulate Seabrook," cannot constitute a compensable taking. Id. at 170.

Pursuant to MEPA, the EOEA, a State agency, is charged with determining the scope of any EIR. See G. L. c. 30, § 62A; 301 Code Mass. Regs. § 11.06 (1987). Another State agency, the Department of Environmental Protection (DEP), is charged with any licensing and permitting under G. L. c. 91. See G. L. c. 91, 10 (granting to the DEP the power to supervise harbors). Additionally, when ONBW sought to change the New Bedford Harbor line, its only remedy was to petition the State Legislature to alter the boundary of the harbor line. Finally, it was the Governor who added the challenged amendments to the Legislature's action on the plaintiffs' petition. In each instance, the Commonwealth was the acting, regulating body. Thus, under the reasoning of Hamilton v. Conservation Commn. of Orleans, the Commonwealth would bear the liability for any taking which results from the application of its authority under G. L. c. 30,

§ 62A, or G. L. c. 91, § 10. 12 Mass. App. Ct. at 369. The city, at each step, was confined to the role of an advocate and cannot be held liable in a takings claim for its actions in this regard. Municipal Light Co. of Ashburnham v. Commonwealth, 34 Mass. App. Ct. at 170.[11]

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[11] The plaintiffs contend that the city can be held liable under the theory of joint liability, which has been recognized in other circumstances when private parties act "under color" of State law. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). "Private persons, jointly engaged with State officials in the prohibited action, are acting 'under color' of law for purposes of [Federal law]. To act under 'color of law' does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." United States v. Price, 383 U.S. 787, 794 (1966). Compare id. at 794 n.7.

The plaintiffs' best case is Archer Gardens, Ltd. v. Brooklyn Center Dev. Corp., 468 F. Supp. 609 (S.D.N.Y. 1979). In Archer, the plaintiffs charged that the city of New York and a private developer conspired to delay the public acquisition of plaintiffs' property in order to devalue the property and eventually acquire it at tax foreclosure sales at prices far below those which the defendants would otherwise have been obligated to pay as condemnation awards. Id. at 610-611. The complaint alleged that the developer "participated for its own benefit with the city in this scheme, willfully violating for its own gain rights secured by the fifth and fourteenth amendments." Id. at 613. The court determined that these allegations established (at least for the purpose of a motion to dismiss) that the acts of the developer "may be deemed to have been done 'under color' of state law and the resultant taking may be construed as a constitutional violation." Ibid.

Similar facts are alleged by the plaintiffs here. The plaintiffs claim that the city acted in concert with the Commonwealth in order to devalue the property so that the city could acquire it cheaply in the future much like the developer in Archer worked in concert with the city of New York. In Archer, however, the developer was chosen to develop and sponsor the urban renewal plan in which the subject property was located. This allowed the developer to be an integral component in implementing the plan and negotiating the purchase of property. Archer, supra at 611 n.5. In the instant matter, the city had no decision, making power with regard to those issues in the control of the Commonwealth. The city could advocate for certain results, but there is no evidence to suggest that the city's lobbying efforts were part of an improper

2. Denial of zoning petition. The plaintiffs contend that the city's refusal to rezone the parcel amounted to a taking because it failed substantially to advance a legitimate land use interest. The plaintiffs do not argue that the current zoning classification itself fails to advance a legitimate interest. Rather, they argue that the city's application of the zoning laws in this instance did not substantially advance any interests tied to zoning. The plaintiffs assert that the city denied the petition because it feared that rezoning the parcel would increase the value of the property and, thus, increase the cost to the city of appropriating the land in the future if the parcel was chosen as the site for the wastewater treatment facility.

The motion judge disagreed. As she noted, "the main purpose of zoning is to stabilize the use of property and to protect an area from deleterious uses." Enos v. Brockton, 354 Mass. 278, 280 (1968). If the city's denial of the plaintiffs' petition to rezone the parcel is a logical and sufficiently well-founded approach to achieving this end, the essential nexus between the public interest and its chosen means will be established. Steinbergh v. Cambridge, 413 Mass. at 747. It has been noted that "a broad range of governmental purposes and regulations satisfies these requirements." Nollan v. California Coastal Commn., 483 U.S. at 834-835.

The current zoning classification of industrial B had been in place for decades. It is difficult to imagine a more reasonable method of stabilizing the use of this property than rejecting petitions to change the longstanding classification. We are uncertain, however, of the precise purpose for the denial of the

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agreement between the city and the Commonwealth. Accordingly, pursuant to our holdings in Hamilton v. Conservation Commn. of Orleans, supra, and Municipal Light Co. of Ashburnham v. Commonwealth, supra, the city cannot be held liable in a takings claim for actions that it was powerless to control. See Hamilton, supra at 369; Municipal Light Co. of Ashburnham, supra at 170.

plaintiffs' petition because the city did not record its reasons for doing so.

It is unclear whether, for our purposes in analyzing the city's decision, "we may properly attribute to the city . . . any apparent reasonable ground for its action, at least if that action is not contradicted by facts established on the summary judgment record." Steinbergh v. Cambridge, supra at 746 n.11. If we could, it would be quite impossible to conclude that the refusal to change the parcel's zoning classification was not a sufficiently well founded approach to stabilizing the use of the property. It is hard "to imagine a more appropriate and closefitting method to further the legitimate interest" of the city. Greenfield Country Estates Tenants Assn., Inc. v. Deep, 423 Mass. at 86.

The plaintiffs claim that the city's reasons for denying the petition are made clear by looking to the comments made by the city planning board in 1987 when the issue of rezoning the parcel was first raised. These statements, all made in opposition to the plaintiffs' petition, are rather useless, however, considering the planning board subsequently voted unanimously to recommend approval of the petition. It was the city council ordinance committee that was responsible for denying the plaintiffs' request. The summary judgment record contains no insight into the reasoning of the city council ordinance committee.

Accordingly, on the summary judgment record, the plaintiffs have not shown that they will be able to prove that the denial of their petition did not substantially advance a legitimate public interest.

The plaintiffs also claim that, even if the denial of their permit advanced a legitimate public interest, it nonetheless effected a taking.[12] We disagree.

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[12] Aside from addressing the usual argument that a taking resulted from the economic impact of governmental action, the plaintiffs further alleged that a compensable taking was effected through the city's purposeful attempt to depress the value of the

a. Lucas analysis. The denial of the plaintiffs' zoning petition did not deprive the plaintiffs' of all economically beneficial uses of the land. Undoubtedly the parcel retained value as a location for industrial uses. It has been "repeatedly recognized that government regulations 'may deprive an owner of a beneficial use -- even the most beneficial use -- without rendering the regulation an unconstitutional taking.'" Daddario v. Cape Cod Commn., 425 Mass. at 416-417, quoting from Moskow v. Commissioner of Envtl. Mgt., 384 Mass. 530, 533 (1981 "A governmental entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of the property." MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 347 (1986). In this instance the denial of the zoning permit affected only the plaintiffs' ability to develop the upland portion of the property with condominiums and commercial space. This restriction "cannot be said materially to affect the marketability of the property so as to deprive it of economic value." Greenfield Country Estates Tenants Assn., Inc. v. Deep, 423 Mass. at 87. Viewing the property as a whole, as we must, it is apparent that the parcel maintained substantial value for alternative economically viable uses. See Daddario v. Cape Cod Commn., supra at 416-417. "The denial

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property. We have already determined that the city cannot be held liable for the regulatory actions of the Commonwealth. In light of this, we need only consider the city's denial of the plaintiffs' petition to rezone as potentially supportive of the allegation that the city intended to depress the value of the property. As we noted above, however, the only evidence presented by the plaintiffs to indicate the city's intent with regard to this action were statements made by the planning board. Given that the decision to deny the rezoning petition was made by a separate body, the city council ordinance committee, the plaintiffs are without evidence to support this claim. We restrict our review therefore to the plaintiffs' arguments regarding the economic impact of the city's actions.

of a particular plan cannot be equated with a refusal to permit any development." Id. at 417.

b. Penn Central factors. When a regulatory action involves neither a physical invasion nor a complete deprivation of use, as is the case here, we examine the following factors to determine whether a compensable taking has occurred: (i) "the economic impact of the regulation on the claimant"; (ii) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (iii) "the character of the governmental action." Leonard v. Brimfield, 423 Mass. 152, 154 (1996) (other citation omitted).

i. Economic impact. Any economic impact resulting from the denial of plaintiffs, petition to rezone is slight. The purchase price that plaintiffs paid for the property would, of course, have taken into account the restricted nature of the parcel's zoning classification. This is not a case in which the government's action changed the status of the parcel. Instead, the denial of the permit held the status quo with respect to the types of uses that the plaintiffs could put their property to. In light of this, the plaintiffs cannot claim that the parcel's value was significantly affected. In fact, only the plaintiffs plans were curtailed, but not their ability to sell or utilize the parcel in economical ways.

ii. Investment-backed expectations. "A property owner's investment-backed expectations must be reasonable and predicated on existing conditions." Leonard v. Brimfield, supra at 155, citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984). Here, the plaintiffs had nothing but a unilateral expectation that the city would permit the zoning change and that, as a result, their investment plan would be realized. The plaintiffs could not have had a reasonable, investment-backed expectation that condominiums and commercial units would be allowed on the parcel. At the time the plaintiffs purchased the parcel it was zoned as industrial B.

There is no dispute that the plaintiffs had actual notice of the classification. Because the plaintiffs purchased the parcel subject to the zoning restriction, they may not now complain about the loss of rights they never had. Leonard v. Brimfield, supra at 155, citing Lucas v. South Carolina Coastal Council, 505 U.S. at 1027. "(T)he government is not required to compensate an individual for denying him the right to use that which he has never owned." Fragovoulos v. Rent Control Bd. of Cambridge, 408 Mass. 302, 308 (1990), quoting from Flynn v. Cambridge, 383 Mass. 152, 160 (1981).

iii. Character of the governmental action. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government." Leonard v. Brimfield, supra at 156, quoting from Penn Cent. Transp. Co. v. New York City, 438 U.S. at 124. Here there is no physical invasion alleged by the plaintiffs. Furthermore, the action challenged in this case is a zoning decision. "Zoning laws are, of course, the classic example [of land use regulations] which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property." Penn Central Transp. Co. v. New York City, supra at 125 (citations omitted). Accordingly, the character of the governmental action is of no help to the plaintiffs.

C. Motion for judgment on the pleadings. "The effect of a motion for judgment on the pleadings is to challenge the legal sufficiency of the complaint.'" Sampson v. Lynn, 405 Mass. 29, 30 (1989), quoting from Burlington v. District Attorney for the N. Dist., 381 Mass. 717, 717-718 (1980). We take "'all of the well pleaded allegations in the [plaintiffs'] pleadings . . . to be true and all contravening assertions in the [defendant's] pleadings to be false.' 5 C.A. Wright & A.R. Miller, Federal Practice and Procedure § 1368, at 691 (1969)." Minaya v. Massachusetts Credit Union

Share Ins. Corp., 392 Mass. 904, 905 (1984). When the defendant is the proponent, the motion is treated as a motion to dismiss which argues that the complaint fails to state a claim upon which relief can be granted. Smith & Zobel, Rules Practice § 12.16 (1974). Mass.R.Civ.P. 12, 365 Mass. 754 (1974). Pupecki v. James Madison Corp., 376 Mass. 212, 214 n.2 (1978).

The plaintiffs argue that the judge erred by analyzing the original complaint along with the first amended and the second amended complaints in ruling on the motion. We agree. The judge reviewed the allegations contained in all three complaints "in an effort to promote judicial economy," and in an effort to address the plaintiffs' allegations which "rel[ied] on the second amended complaint." (A. I:221) Although this may have been an attempt to aid the plaintiffs' efforts, a judge may not look beyond the pleadings without treating the motion as one for summary judgement. Mass.R.Civ.P. 12(c), 365 Mass. 754 (1974). The plaintiffs' complaint had already been amended once. Thus, the original complaint was certainly no longer relevant. Furthermore, the second amended complaint had not yet been allowed. If the judge wanted to address the allegations contained therein, he should have first allowed the plaintiff's motion to amend. Instead the judge simply addressed some of the allegations contained in the second amended complaint without recognizing that the complaint added defendants or applying the allegations of the second amended complaint to those newly added defendants.[13] The plaintiffs' motion to amend was subsequently denied as it applied to the EOEA.[14] The parties have not challenged this decision. Accordingly, only the first amended complaint should be reviewed.[15]

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[13] Addressing all three complaints had no real bearing on the judge's analysis of the plaintiffs' claim. The judge held that "[t]here simply is no relief to the extent that the complaint alleges that the scoping decisions of the EOEA constituted a constructive taking of the plaintiffs' property." The judge noted that the plaintiffs were required to follow the MEPA regulations, and they did not allege that the process took longer than usual. The judge failed to address, however, the heart of the plaintiffs' claim: that

The error is harmless, however, because the plaintiffs, claim is barred by the statute of limitations.[16] The plaintiffs' claim was brought purportedly pursuant to G. L. c. 79, § 9 and/or 10. The limitation in § 9 is not applicable because the claim here is not for an injury, in the words of that statute, caused "by the establishment, construction, maintenance, operation, alteration, repair or discontinuance of a public improvement which does not involve the taking of private property." The limitation in § 10, applying to acts in pais, is to be used in this case because the "damage" of which the plaintiffs complain was not "effected by or in accordance with a formal vote or order of the board of

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the requirements set by the EOEA exceeded the scope of its authority. Indeed, it has been recognized that scoping decisions can create a legally cognizable injury. Villages Dev. Co. v. Secretary of the Executive Office of Envtl. Affairs, 410 Mass. 100, 106 (1991).

[14] The judge allowed the plaintiffs to amend those claims applying to the city but denied all amendments applicable to claims against the EOEA.

[15] The first amended complaint makes only a single allegation that can be credited to the EOEA. The allegation states that:

> "So long as Standard Times Field was subject to the screening studies and so long as it was designated the alternate site for the treatment plant, the plaintiffs were not allowed by the defendants to develop the property in a manner incompatible with its potential use as a site for the waste water treatment plant."

(App. I:19) The second amended complaint is far more detailed.

[16] Although the EOEA raised this argument below, it was not addressed by the motion judge.

officers of a body politic or corporate duly authorized by law."[17] G. L. c. 79, § 10. See Wine v. Commonwealth, 301 Mass. 451, 455 (1938). Accordingly, "[i]n case of a specific taking, entry, seizure or other act causing destruction or damage or depriving the owner of the use of his property permanently or for a definite period of time,, the right to damages shall vest on the date of the specific act, and a petition for the award of damages may be filed within one year from that date, "otherwise damages shall he assessed with respect to any parcel of property as of the date when such property was first injuriously affected, the right thereto shall vest upon the completion of the public improvement which caused the injury, and a petition for an award of damages therefor under this section may be filed within one year after such completion." G. L. c. 79, § 10.

In this case, it was not the construction of the second wastewater treatment plant that caused the plaintiffs' alleged injury. Rather, it was the alleged refusal of the EOEA to permit development of the parcel after it was designated as a potential location for the plant. Thus, the operative date for calculating the statute of limitations is the date of the EOEA's action preventing development of the property. The EOEA's actions, however, were ongoing in nature, and it is not apparent in looking to the pleadings whether any singular act, in and of itself, rose to the level of a taking. "The statute requires a definite and distinct act as beginning the period in which a petition for damages may be filed. The Legislature did not intend to put the burden upon the landowner to determine when in the partial performance of a piece of work the period for bringing a petition would start to run against him." United States Gypsum Co. v. Mystic River Bridge Authy., 129 Mass. 130, 142 (1952), citing United States v. Dickinson, 331 U.S. 745 (1947). The critical point occurs when the "landowner has actually parted with his property or its possession or some interest therein." United States Gypsum Co. v. Mystic River Bridge Authy., supra at 141.

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[17] The acts of which the plaintiffs complain were authorized by law and, by hypothesis for the purpose of analyzing the statute of limitations, involved the "taking" of land. Cf. Triangle Center, Inc. v. Department of Pub. Works, 386 Mass. 858, 861 (1982), in which the court concluded that there was no taking (in pais) because there was no action appropriating land pursuant to statute and the concept of a regulatory or de facto taking was not considered.

The plaintiffs contend that the relevant moment was the date of foreclosure on the property. The EOEA argues the clock started in 1987 when the plaintiffs discovered that the parcel had been designated as a potential site for the new wastewater treatment plant. Neither date is relevant to our inquiry. The date of the foreclosure is not related to the alleged taking. Foreclosure results from a breakdown in the relationship between mortgagor and mortgagee. It marks the moment when the plaintiffs ran out of money, but does not shed light on when a regulatory taking may have occurred. The date that the plaintiffs discovered their land was earmarked as a potential site for the plant is also unhelpful. At that point, the plaintiffs had not filed an ENF with the EOEA and could not have appreciated the manner in which the EOEA would proceed with the proposed development. For purposes of eminent domain, the significant event is the taking of the plaintiffs, property for a public purpose. In a regulatory takings action, the injury is defined by the regulatory action and its impact on the landowner's property interests.

Although the first amended complaint is barren of any dates or references to specific regulatory actions taken by the EOEA, the relevant facts were part of the public arena and are undisputed. Indeed, in their reply brief, the plaintiffs cite to certain actions taken by the EOEA that would serve to evidence injurious regulations for the purposes of establishing the starting point for a statue of limitations analysis.

Even assuming that any of these events constituted a taking, none occurred within one year of the filing of the plaintiffs' complaint. Even taking a more generous approach and looking to the latest action taken by the EOEA regarding the plaintiffs, property does not help the plaintiffs. The latest possible action taken by the EOF.A occurred in June, 1990, when the EOEA refused to de-designate the property as an alternative site for the treatment plant. The plaintiffs' complaint was not filed until July 8, 1992. Accordingly, even taking a generous approach, the plaintiffs, action is barred by the statute of limitations.

III. Conclusion. Accordingly, there was no error in the allowance of the city's motion for summary judgment and the EOEA's motion for judgment on the pleadings.

Judgments affirmed.

By the Court (Brown, Dreben
Doerfer, JJ.),

/s/
First Assistant Clerk

Entered: September 12, 2002.

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 92-01987

VINCENT GRASSO & others[1]

vs.

CITY OF NEW BEDFORD & another[2]

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The plaintiffs, owners of a parcel of property in New Bedford, Massachusetts known as Standard Times Field, commenced the present action against the City of New Bedford (the "City") and the Executive Office of Environmental Affairs ("EOEA") seeking compensation for an alleged regulatory taking of that property. This matter is now before the court on the cross-motions for summary judgment filed by the plaintiffs and by the City.[3] For the reasons discussed below, the plaintiffs' motion for summary judgment is **denied,** and the City's cross-motion for summary judgment is **allowed.**

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[1] Robert P. Regan, Palmer's Cove Limited Partnership, and Old New Bedford Waterfront Corporation.

[2] The Executive Office of Environmental Affairs.

[3] On October 21, 1994, this Court (O'Brien, J.) entered judgment on the pleadings in favor of EOEA on the ground that the plaintiffs had no cause of action against that agency for a regulatory taking because they had failed to timely challenge EOEA's Environmental Impact Report scooping determination.

BACKGROUND

The undisputed material facts as established by the summary judgment record are as follows:

Plaintiffs Vincent Grasso ("Grasso") and Robert Regan ("Regan") incorporated the Old New Bedford Waterfront Corporation ("ONBW') to conduct the general business of real estate acquisition, investment, and development. On September 25, 1986, ONBW entered into a purchase and sale agreement to purchase a vacant waterfront parcel of land known as Standard Times Field (the "Parcel") from Palmer's Island Corporation for $2.7 million. The Parcel consists of "upland," which is bounded by New Bedford Harbor, and "submerged land," which runs under the harbor to Palmer's Island. The plaintiffs intended to develop the Parcel, which was zoned as an "Industrial B" district, as a marina and waterfront park. They also considered the possibility of developing the upland with condominiums, which would require a zoning change to a "Mixed Use" district since residential uses are not permitted in an "Industrial B" zone. The plaintiffs expected to obtain the necessary zoning change because the Parcel had been vacant since the 1930's; it was believed to be unsuitable for maritime industrial use due to a hurricane barrier, which effectively blocked direct access to the ocean, and shallow drafts between the upland and Palmer's Island. The New Bedford Harbor Master Planning Study done in the 1970's identified the Parcel as most appropriate for parks and beaches. That description continued in a draft New Bedford-Fairhaven Harbor Master Plan being developed at the time that the plaintiffs purchased the Parcel. The Parcel was free of oil and hazardous wastes. The plaintiffs anticipated permitting for all uses to be completed within two years of their purchase of the Parcel.

Pursuant to the federal Clean Waters Act, the City was required to upgrade its Fort Rodman wastewater treatment plant to meet federal secondary treatment effluent limitations.[4] To accomplish this, the City needed to construct a secondary wastewater treatment plant to work in tandem with the Fort Rodman plant. Federal funds were available to the City to study, plan, and build the secondary plant, but not to purchase or take by eminent domain private land on which to locate it.

ONBW closed on the purchase of the Parcel on December 30, 1986, financing the deal by executing a promissory note for $2.7 million to the Warren Five Cents Saving Bank (the "Bank"), secured by a mortgage on the Parcel in that amount.

Thereafter, on February 2, 1987, the City filed an Environmental Notification Form ("ENF") with EOEA, the agency responsible for implementing the Massachusetts Environmental Protection Act ("MEPA"), G.L. c. 20, §§ 61-62H. The City's ENF identified four possible locations for the secondary wastewater treatment plant. One of the alternative locations was the upland portion of the Parcel; another involved expansion of the existing Fort Rodman plant onto adjacent property.

The City's Mayor, John Bullard, publicly opposed the development of the tidelands portion of the Parcel with a marina because it would make it more costly for the City to acquire the upland for a secondary wastewater treatment plant in the event that the upland were to be chosen as the site for the plant. In April of 1987, Mayor Bullard informed ONBW that the City was considering the Parcel as a potential location for its secondary wastewater treatment plant and requested that it delay development plans until the completion of the plant selection process.

Residents from the Fort Rodman neighborhood were adamantly opposed to siting the secondary plant at Fort Rodman. They formed highly active and influential citizen groups, including the Save Fort Rodman Committee and the South End Citizens Association. At all relevant times, these two groups opposed the marina project because they believed that it would increase the cost to the City of taking the Parcel for the treatment plant, making it more likely that the Fort Rodman site ultimately would be chosen.

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[4] The Fort Rodman plant is located on land in the South End of the City in Ward 6.

On July 8, 1987, Grasso and Regan formed the Palmers Cove Limited Partnership (the "Partnership"); each was a 49.5% limited partner, and ONBW was the general partner and 1% limited partner. ONBW deeded its title and rights to the Parcel to the Partnership in exchange for the Partnership's assumption of liability on the promissory note.

On August 27, 1987, ONBW filed an ENF for its waterfront park project with the EOEA.[5] The ENF described plans to construct a marina, harbor master's house, public boardwalk along the water's edge, two restaurants, a fifty room guest inn, 10,000 gross square feet of marine-related and commercial retail space, and 10,000 gross square feet of neighborhood retail space on the Parcel. The ENF further noted:

> This parcel is adjacent to a 22+ acre parcel which is currently scheduled for development (see attached site plan).

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[5] Under MEPA, before any state agency can issue a permit for a proposed development project, the EOEA must determine, after consulting with all interested parties, whether a comprehensive environmental impact report ("EIR") is required and, if so, must determine the form, content level of detail, and alternatives required for the report and must limit the scope of the report to those issues which, by the nature and location of the project are likely to cause damage to the environment and, if no financial assistance from the agency is sought, to those issues which are within the subject matter jurisdiction of the permit. Villages Development Co. v. Secretary of the Executive Office of Environmental Affairs, 410 Mass. 100, 102 (1991), citing G.L. c. 30, § 62A; 301 Code Mass. Regs. § 11.06.

> The preferred development program for that-parcel is residential with related amenities. However, at present, that parcel is zoned as Industrial B and will require rezoning to accommodate housing. The applicant desires to proceed at this time with the park project because: (1) the time frame for the residential rezoning has not been defined and (2) the waterfront park is financially and programmatically independent of the residential project (i.e. (a) marina slips are not associated with residential units, and (b) the waterfront park will be developed with or without the residential development.) The applicant will submit a separate ENF for the remainder of the parcel at the appropriate time.

Thereafter, on September 30, 1987, Mayor Bullard wrote a letter to EOEA Secretary James Hoyte containing his official comments regarding ONBW's ENF. The Mayor wrote:

> I have a major concern about this project's timing relative to another that is in the planning stages. I am referring to the construction of a secondary wastewater treatment plant in the City of New Bedford ... On January 30, 1987, the City filed an Environmental Notification Form ... specifically naming that site as a possible location for our new wastewater treatment plant with the final decision (excluding the approval process through DEQE and EPA) made by next spring.
>
> ...

While primarily concerned about the proposed project because of its timing, I am also equally concerned that the use proposed for what is the largest remaining undeveloped area within a designated port receive a comprehensive review. A comprehensive review cannot be made if the project continues in its current segmented state. It is very clear that the area proposed for development is connected with the land inland from the development. In fact only 14 acres of the proposed development are above the high water mark, leaving 22 acres of land to be developed in a manner not mentioned.

Therefore, I am urging you to include within the scoping requirements for the Environmental Impact Report a condition that the Proponent fully address all development alternatives for that site. This should include:

1. A discussion of the Waterfront Park/Marina including alternatives if the remainder of the property remains industrially zoned;

2. A discussion of the Waterfront Park/Marina including alternatives if the remainder of the property receives a zoning change to residential;

3. A discussion of the Waterfront Park/Marina if the wastewater treatment plant were

> > to occupy the remainder of the property; and
> >
> > 4. A discussion of an alternative if it were to be used only for the wastewater treatment plant with no Waterfront Park or Marina.
>
> At this point and for the next several years the construction of a secondary treatment plant will remain the number one environmental priority of the City.

Also on September 30, the City's Environmental Planner, Marcy Weatherbee, wrote a letter to the EOEA containing her official comments on the project. In addition to discussing issues such as wetlands, traffic and parking, and solid waste, Weatherbee stressed the importance of getting an EIR that assessed the entirety of the proposed project, including likely future expansions. She wrote:

> Old New Bedford Waterfront Corporation feels that their project does not conflict with "current federal, state and local ... environmental plans and policies." In fact, this is not the case at all. The "environmental plan" I am referring to is the construction of a secondary treatment plant in the City. The Proponent is fully aware of the fact that the City is considering that site for the location of treatment plant. The final siting decision will be made in the Spring of 1988. Their project, as proposed, directly conflicts with any plans the City may have for a treatment plant on the remainder of that site.

...

> One of the general concerns I have relates to the severability of this project. The key can be located within 301 CMR 11 which states, "the entirety of a proposed project, including likely future expansions, shall be considered and not separate phases or segments thereof." . . . Because the Proponent has the "intent" to develop the remainder of the property, and the fact that any impacts from future development cannot be easily separated, I am requesting that they be required to fully address all possible alternatives for the entire site. This should consist of a discussion of the current project including the residential project, the current project with an industrial portion, the current project with a wastewater treatment plant on the remainder of the site, and, perhaps, a scenario if the treatment plant were to occupy the entire site.

On October 13, 1987, pursuant to MEPA, EOEA issued a Certificate requiring ONBW to prepare an Environmental Impact Report for the waterfront park project. The Certificate stated:

> There is disagreement whether this project taken alone, constitutes segmentation, pursuant to 301 CMR 11.16. The pertinent facts, regarding the issue areas follows:
>
> * the project described in the ENF ... does have independent utility;

> * on the other hand, the project could potentially preclude or affect the choice of alternatives or mitigation for the remaining 22 acre parcel, because of the loss of direct access to the waterfront.
>
> The importance of an analysis of alternative uses for the site has been clearly demonstrated. This site is in a Designated Port Area (DPA); however, the project proposal is inconsistent with the marine industrial designation. Moreover, this site is being actively considered by the City of New Bedford for a secondary wastewater treatment plant.
>
> Based on these facts, it will be important to evaluate the potential effects from the entire project. A review process will be established whereby the Draft EIR is a planning document for the entire site. When the public review of the draft has been satisfied, it will be possible for the proponent to proceed with a Final EIR for the discrete phases of the entire project.

The Certificate thus required the scope of the EIR to include: 1) The "Preferred Alternative, as described in the ENF, and including the residential component for the 22 acre site"; 2) "A Maritime-dependent Industrial Project Alternative, which is consistent with the state's Designated Port Area policies"; 3) "A Secondary Treatment Plant Alternative should be presented, based on the site assessment study that is being prepared for the City of New Bedford"; and 4) "Additional Alternatives that are a combination of elements of alternatives 1 and 2, and alternatives 1 and 3."

With respect to the residential component for the 22 acre site, the Certificate noted that "in order for this proposal to proceed, a local zoning change will be necessary," a proposition that was undisputedly accurate. Nothing in the Certificate required that the zoning change actually be obtained prior to completion of the EIR, or stated that EOEA approval would not be forthcoming for the marina were condominiums not permitted to be built on the upland. Indeed, the language describing "additional alternatives" makes it clear that ultimate approval of the marina was not tied to rezoning; EOEA pointed out that, at the scoping session, a representative of EPA had observed that a waterfront park and marina are not necessarily incompatible with industrial uses. The plaintiffs chose not to challenge the validity of any part of the Certificate.

ONBW employed experts to conduct a wetland resources study and met with the City's Shellfish Constable, the Commonwealth's Division of Marine Studies, the EPA, the U.S. Army Corps of Engineers, and the Division of Wetlands and Waterways of the Commonwealth's Department of Environmental Protection ("DEP") to develop mitigation measures for the proposed work on eight identified wetland resource areas in the Parcel. ONBW also commissioned a study of the navigation impacts of the proposed marina, including detailed harbor traffic counts and a wave and wake analysis incorporating weather and wind data. Further, it commissioned detailed engineering studies analyzing the Parcel's suitability for diverse maritime dependent industrial uses, and its suitability for the proposed condominiums, including community economic benefits and fiscal impacts of the condominiums, a comprehensive marina needs analysis, and a comprehensive automobile traffic count with proposed mitigation measures.

On December 4, 1987, ONBW filed an application with the City Council to amend the zoning of the Parcel from Industrial B to Mixed-Use Business in order to permit the condominium project. New Bedford's Planning Board (the "Board") was required to review the petition and make a non-binding, advisory recommendation to the City Council Ordinance Committee. In connection with ONBW's petition, the Board received a letter from the South End Business Association opining that, although the proposal would economically benefit the City, rezoning should be postponed until the City determined the exact location of its waste treatment plant.

New Bedford City Planner and Planning Board Chairman also wrote to the Board concerning the wisdom of changing the classification from Industrial B to a use which would allow retail, commercial, and industrial use. He questioned whether the Parcel was "the most appropriate site for residential use being bracketed on the north and south by heavy industrial uses" and whether, as part of a Massachusetts Coastal Zone Management Designated Port Area, the Parcel was "suitable for commercial and retail uses of a non waterfront dependent nature." He answered the questions he had raised with the statement, "[t]he Planning Department thinks not," while adding that the Department was open to be convinced through a thoughtful analysis of alternative uses for the site. He also pointed out that the plaintiffs' EIR for the Parcel could be used as a planning tool to aid decision making bodies such as the Planning Board. He concluded that neither the planning Department nor the Planning Board had sufficient data to make an informed recommendation and, thus, the existing zoning should be deemed best suited to the City's needs.

On February 17, 1988, the Board held a public hearing on ON13W's petition. City Councilor and

Planning Board Member Daniel Hayes opined that the rezoning petition was premature and stated:

> How can I be expected to vote tonight when we have a letter from our own Planning Department stating that we have insufficient evidence? ... I have no problem with the entire parcel, in fact I would like to see it go ahead, but I think we have to wait for the site of the plant, the people in this City will have to pay forever, (a sewer user tax), wherever the plant goes will certainly be hardship cost. So we have to make sure, that is what I am saying.

In addition, the President of the South End Civic Association read into the minutes, on behalf of four hundred residents, a letter opposing the rezoning which argued that a rezoning was premature since the area was under consideration as a site for the secondary sewage treatment plant. The Association pointed out that "premature zoning could cost the City much more to acquire this land if it were selected as the sewage treatment plant site." At the close of the meeting, the Board voted unanimously to refer the rezoning petition to the City Council Ordinance Committee without a recommendation.

The City Council Ordinance Committee held a public hearing on ONBW's petition on March 17, 1988. At this time, ONBW withdrew its petition and promised to work cooperatively with the City until the wastewater treatment plant siting decision was made, but requested that the Council do whatever it could to speed up the siting process. ONBW did not commence a suit challenging the validity of the Industrial B zoning classification as applied to the Parcel.

Thereafter, in June of 1988, ONBW submitted its Draft EIR[6] to the EOEA, with copies provided to various City officials, including the Planning Department. During early August of 1988, the New Bedford Seafood Dealers Association, the Offshore Manners' Association, the New Bedford Chamber of Commerce, and the publisher of the Standard-Times wrote letters to the EOEA supporting ONBW's proposed development of the Parcel, as did abutters United Social Club and Cape Cod Sportswear Co., City Council President James Sullivan, Councilor John Saunders, State Representatives Joseph McIntyre and Denis Lawrence, and State Senator William McLean, Jr.

On August 11, 1988, New Bedford's Environmental Planner wrote a letter to the EOEA criticizing the Draft EIR, but not on the grounds that development of the marina would increase the expense of eminent domain should part of the Parcel be taken for the treatment plant. She wrote as follows:

> The Proponent states "Although the project site is of sufficient size to accommodate the treatment plant, insufficient buffers exist between the site and adjacent residential properties and other uses. . ." The proponent's conclusions are premature, if not totally incorrect. The detailed environmental evaluation of WWTP site alternatives is scheduled for completion by December 1988. The level of analyses of the WWTP alternative conducted by the Proponent is insufficient tc draw the conclusions presented.... The proponent fails to provide any objective analysis of the

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[6] The draft EIR contained 155 pages of text plus numerous lengthy exhibits.

economics of the project and instead has described this alternative in terms of "public costs." Again, the conclusions of this analysis are premature.

The following week, on August 19, 1988, the EOEA issued its Certification stating that the Draft EIR complied with MEPA and its implementing regulations. It noted, however, as follows:

> The alternatives analysis ... is a missed opportunity. The discussions in the Draft EIR lead to the conclusion that the proposed project is superior to other possible alternatives. At this stage of the review these conclusory discussions are premature. Since alternatives have been deemed unrealistic, impact analyses have been dismissed, leaving reviewers at somewhat of a loss, particularly since the site is being actively considered for public projects.
>
> This approach could interfere with creative solutions to conflicting interests for the development of the Palmer's Cove site. The Final EIR should take into account the serious comments on the alternatives analysis and should be more forthcoming in the analysis of site options. For example, even if the proponent is not interested in a mixed use proposal, such as a waterfront park/marina and wastewater treatment plant, the Final EIR should evaluate the potential for and impacts of such a mixed development.

The Certificate also found no meaningful assessment of the issues relating to the Parcel being part of a Designated Port Area. EOEA observed that even though the site had been vacant for many years, the potential for future uses could not be written off, noting that at least two water related industrial uses at the site were being contemplated, namely the wastewater treatment plant and a disposal site for contaminated dredging materials. The Certificate also raised several questions which were required to be answered in the final EIR concerning the plaintiffs' dredging plans. Once again, the plaintiffs did not mount a legal challenge to EOEA's requirement that the final EIR contain an analysis of site options for the entire Parcel or to anything else contained in the Certificate.

From August until December 1988, ONBW met with state and city officials to discuss the requirements of the Final EIR. ONBW learned at these meetings that condominiums could only be allowed on the upland if that property were "de-designated" from the New Bedford/Fairhaven Port Area, and that only the City could apply for such a de-designation.[7] When ONBW emphasized that it wanted to proceed with only the marina portion of the project, EOEA advised that the marina was ineligible for a Chapter 91 license because it would extend beyond the New Bedford harbor line.[8]

To remedy the chapter 91 problem, ONBW petitioned the Legislature to alter the boundary of the New Bedford Harbor Line. The New Bedford Chamber of Commerce, the publisher of the Standard-Times the New Bedford Harbor Development Commission, the

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[7] There is no evidence that the advice given to ONBW regarding the necessity of de-designation was given in bad faith. ONBW at no time sought declaratory relief with respect to the necessity of de-designation.

[8] G.L. c. 91, the Waterways Permit and License Programs designed to protect the Commonwealth's interests in navigable waters. Under c. 9 1, a license from the DEP is required for any construction or filling activity in or over tide waters below the high water mark. See c. 91, §§ 14-18.

Mayor's Economic Development Office, and City Councilor James Sullivan wrote letters to the Legislature supporting legislation that would accomplish what ONBW was seeking.

On February 20, 1989, Mayor Bullard publicly announced that he had selected Fort Rodman as the site for the secondary wastewater treatment plant. However, City Council approval was needed to raise the taxes to fund the plant, remove federal deed restrictions on the land containing Fort Rodman, and approve the local permits needed for construction of the plant.

As quoted in the Standard-Times in June of 1989, City Councilor Ralph Saulnier opposed legislation altering the boundary line of the harbor for the following reason:

> If this bill passes, will the property become more valuable? Does that rise in value then make it impossible for us to afford to take the land if we need it? ... I think it would be foolish to allow this bill to go any further until we have more information... If that plant has to go at the Standard-Times Field, are we going to force the taxpayers of this city to pay more for this property than they should?

City Councilor Nelson Macedo was quoted as stating, "I think any site that is being considered as a back-up site shouldn't be touched." Councilor-at-large Daniel Hayes was quoted as stating, "Certainly this bill will enhance the (value of) the Standard-Times Field... We owe it to every concerned party, the mayor, the City Council, to get the best information we can about this legislation."

In July of 1989, ONBW filed a Notice of Intent with the New Bedford Conservation Commission and an application with the DEP Wetlands and Waterways Division for a Chapter 91 license for dredging and the construction of a marina, boat slips, fueling station and a travel lift pier. On July 23, 1989, the Save Fort Rodman Committee wrote to Governor Dukakis asking him to defer signing legislation changing the harbor boundary line, stating:

> Fort Rodman and the land affected by SB1131, known as Standard-Times Field, have been chosen by our Mayor as potential sites for a secondary wastewater facility. We feel that both properties should remain status quo, since the sites are currently being considered, reviewed and analyzed by federal and state agencies, and the final decision for the plant has yet to be made. We feel, however, that the owners of the Standard-Times field through enactment of SB1131, have taken action to increase the value of their land. We believe this would place a further burden on the taxpayers of the city of New Bedford if the Standard-Times field is chosen as the site and eminent domain proceedings must be instituted.

Enclosed with this letter was a statement signed by nine City Councilors requesting the Governor not to sign Senate Bill 1131 until the Committee on Natural Resources could conduct an advertised public hearing in New Bedford and the City Council had the opportunity to formally take a position on the legislation. Unlike the letter from the Save Fort Rodman Committee, the letter from the Councilors does not ask the Governor not to sign the bill because it might increase the cost to the City should eminent domain proceedings be instituted.

On August 8, 1989, Governor Dukakis recommended that the legislation be amended as follows: "This act shall take effect upon a final written determination by the Department of Environmental Protection that the upgraded wastewater treatment facilities for the City of New Bedford will be sited at a location other than the Standard Times Field site." The Governor stated that he was recommending such language for the following reasons:

> [M]y concern has to do with the upland parcels that the bill affects. The upland parcels of land, known as the Standard Times Field, is the proposed alternative site for the upgrading of New Bedford's sewage treatment facilities.... Should these facilities be required to be located at the Standard Times Field site, this legislation as currently drafted could result in a substantial increase in the cost to New Bedford's ratepayers and the Commonwealth's taxpayers.

The legislation amended in the way that the Governor proposed.

On August 22, 1989, the New Bedford Conservation Commission issued an Order of Conditions to ONBW for the dredging and construction of the marina. DEP's Wetlands and Waterways Division did not take jurisdiction of the Order of Conditions. The same day, the Director of Massachusetts Coastal Zone Management wrote a memorandum to the EOEA stating that "we should be cautious in the state's support for any private development projects in New Bedford until we have a better sense of where the two treatment facilities will be located. My main interest is for protecting the ratepayers of the city and the taxpayers of the Commonwealth." An internal DEP memo dated August 30, 1989 stated that it "would be desirable to wait as long as possible before making the determination mentioned in the amendment [to Senate Bill 1131]. It is possible that a final decision about the siting won't be made until the spring of next year."

In October of 1989, ONBW filed an application with DEP for a Water Quality Certificate for dredging. On October 24,1989, City Councilor Ralph Saulnier wrote to the EOEA, reminding it that the City had not yet made any decision about the site for the Wastewater Treatment Plant because the City Council had not endorsed the mayor's selection.

In November, ONBW filed an application with the Department of the Army for a federal permit for the marina project.[9] On December 26, 1989, Mayor Bullard wrote to the EOEA requesting, on behalf of the City of New Bedford, the de-designation of the Parcel from the New Bedford-Fairhaven Designated Port Area.

In January of 1990, ONBW once again filed a petition with the City Council to rezone the Parcel known as the Standard-Times Field from Industrial B to a Mixed-Use Business District. The Planning Board held a public hearing on February 6, 1990, during which Mayor Bullard and City Planner Alfred Lima recommended approval of the petition. The Chairwoman of the Save Fort Rodman Committee and City Councilor Ralph Saulnier spoke in opposition to the petition. The Planning Board voted unanimously to recommend approval of the petition.

On February 2, 1990, the Mayor again requested that EOEA approve de-designation. On February 8,1990, the Save Fort Rodman Committee wrote to the EOEA opposing the City's request to de-designate the Parcel from the port area, stating: "We feel that this designation will increase the value of the land at the Standard-Times Field if the City is required to take said land through an eminent domain proceeding."

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[9] There is nothing in this record that demonstrates that such permits were ever granted.

On February 15, 1990, the City Council Ordinance Committee held a hearing on ONBW's rezoning petition. After denying a continuance sought by ONBW, the Committee voted eight to two against the rezoning.

On February 20, 1990, EOEA ruled on the City's request for de-designation by stating that, pursuant to MEPA, such a request required the preparation of an EIR.

Thereafter, on March 5, 1990, the EOEA rejected the City's Facility Plan for the secondary wastewater treatment plant as incomplete, stating that it failed to comply with MEPA, in part, because it failed to adequately delineate proposed mitigation of community impacts at Fort Rodman. By letter dated March 12, 1990, the New Bedford City Council notified the EOEA that it "would not be supportive of any actions that might minimize or eliminate the use of the Standard-Times Field as a site for the secondary/primary sewage treatment plant for the City of New Bedford."

In April of 1990, Mayor Bullard challenged the City Council to vote on a final site for the treatment plant. A simple majority of six votes was needed to choose a site, while eight votes were needed to lift the deed restrictions on Fort Rodman. Meanwhile, on April 11, 1990, the Bank notified ONBW that it was in default on its loan for the Parcel. On May 1, 1990, the City Council voted six to five to approve the ranking of the Fort Rodman Site first and the Standard Times Field second for the siting of the secondary wastewater treatment plant.

The following day, the Standard-Times reported City Councilor Saulnier as stating that he intended to use deed restrictions on the Fort Rodham land to block constructing the plant there. The Bank sent ONBW a notice of intent to foreclose on September 27, 1990, and, on October 19,1990, ONBW filed for Chapter 11 Bankruptcy, temporarily staying the foreclosure. On November 26, 1990, EOEA issued its

Certificate on the City's Supplemental Final Environmental Impact Report, stating that "several outstanding issues remain ... including the relocation of existing facilities at Fort Rodman."

The Bank foreclosed on the Parcel on August 28, 1991, with ONBW owing substantial deficiencies. The controversy over the siting of the wastewater treatment plant continued long after the foreclosure.

There never was an order of taking pertaining to the Parcel. The City did not physically occupy or invade the plaintiffs' land or otherwise cause any physical injury to the Parcel.

The present action alleges that the concerted actions of the City, the EOEA, and other state actors with respect to the Parcel constituted inverse condemnation in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution and Article 10 of the Massachusetts Declaration of Rights.

DISCUSSION

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976); Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983); Mass. R. Civ. P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue and that the summary judgment record entitles the moving party to judgment as a matter of law. Pederson v. Time Inc., 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. Kourouvacilis v. General Motors Corp., 410 Mass. 706,716 (1991); Flesner v.

Technical Communications Corp., 410 Mass. 805, 809 (1991).

ONBW and the City both agree that there are no material facts in dispute. Each contend that it is entitled to judgment as a matter of law based on the summary judgment record.

The Fifth Amendment to the United States Constitution prohibits the taking of private property for public use without just compensation. Similarly, Article Ten of the Massachusetts Declaration of Rights states whenever an individual's property is appropriated for public use, he shall receive reasonable compensation therefor. When the claim is that government conduct, not amounting to a permanent physical occupation or confiscation of property, constitutes a regulatory taking, the analysis is peculiarly fact dependent, involving ad hoc, factual inquiries. Daddario v. Cape Cod Commission, 425 Mass. 411, 416 (1997); Steinbergh v. Cambridge, 413 Mass. 736, 741 (I 992), cert. denied, 508 U.S. 909 (1993).

The plaintiffs advance various theories in support of their contention that a regulatory taking of the Parcel occurred for which the City must provide fair compensation.

I. TAKING BASED ON THE ALLEGED FAILURE OF THE CITY'S ACTIONS TO SUBSTANTIALLY ADVANCE LEGITIMATE LAND USE INTERESTS

Regulatory action amounts to a taking if it fails to substantially advance a legitimate state interest. Greenfield Country Estates Tenants Ass'n, Inc. v. Deep, 423 Mass. 81, 86 (1996); Steinbergh, supra, 413 Mass. at 744. The plaintiffs contend that the City's actions with respect to the Parcel constitute a compensable taking because they did not substantially advance the City's legitimate land use interests. The actions at issue are 1) the City's inducing EOEA to impose an unduly burdensome scope on the EIR for the marina project, including consideration of alternatives involving the construction of condominiums and the placement of the City's wastewater treatment plant on the Parcel's uplands;[10] 2) the City's inducing EOEA to condition ONBW's state and federal permits for the marina project on the re-zoning of the Parcel as well as on the de-designation of the site as a port area and on the change in the harbor line, and then inducing the Governor to condition the harbor line change on the Parcel's not being chosen as a site for the City's treatment plant; and 3) the City's denial of ONBW's petition to re-zone the Parcel from Industrial B to Mixed-Use Business.

The burden is on the landowner to demonstrate that the challenged regulatory actions do not meet the constitutional standard of substantially advancing the government's legitimate land use interests. Lopes v. Peabody, 417 Mass. 299, 307 n. 13 (1994); Steinbergh, supra, 413 Mass. at 745. The test is not one of strict necessity; rather, what is required is an "essential nexus" between the City's interests and its chosen means, a logical and sufficiently well-founded approach to dealing with the problem faced by the City. Id. at 746-747.

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[10] The plaintiffs failed to challenge the EOEA's scoping decision. Exhaustion of administrative remedies is not a prerequisite to assertion of a takings claim where the landowner accepts the correctness of a decision under the relevant statutory and administrative scheme but alleges that the regulatory decision constitutes a compensable taking. Hamilton v. Conservation Comm'n, 12 Mass. App. Ct 359, 374 (1981). Here, however, ONBW claims that EOEA's scoping decision was improper because it required consideration of alternatives, including the condominium project and the wastewater treatment plant. See Wilson v. Commonwealth, 413 Mass. 352, 356 (1992) (landowners generally cannot challenge land use regulations as a taking until they exhaust administrative processes which might eliminate the taking).

A. Scope of the EIR

EOEA is not a municipal agency. Whether the scope of the EIR dictated by EOEA substantially advanced legitimate land use interests is relevant only if the plaintiffs have demonstrated that the City was responsible for the EOEA's scoping decision with respect to the manna project. They have not.[11]

The fact that the scoping requirements imposed by the EOEA are in conformity with those recommended by the City in its official comments does not, without more, warrant an inference that the City is responsible for the actions of the EOEA. See, e.g., Wolfman v. Board of Appeals of Brookline, 15 Mass. App. Ct. 112, 120, rev. denied, 388 Mass. 1104 (1983) (the fact that developers submitted a draft decision to the zoning board, which may have relied on the draft in writing its decision, does not, standing alone, constitute a showing of lack of independent analysis by the Board).

There is no evidence in this record that the City is responsible for the decision by the EOEA, an independent state agency charged with environmental protection, to impose the EIR scope that it did.[12]

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[11] Although the City did not dispute the plaintiffs statement of undisputed facts in the form of a lengthy affidavit by plaintiff Vincent Grasso, many paragraphs in that affidavit contain conclusory assertions bearing on causation that are not based on the affiant's personal knowledge; since they are not appropriately part of an affidavit they shall be disregarded. Post v. Commissioner of the Department of Environmental Quality Engineering, 403 Mass. 29, 35 n. 8 (1988) ("[s]tatements of conclusions are not appropriately part of an affidavit from a nonexpert"); Madsen v. Erwin, 395 Mass. 715, 721 (1985). Further, to the extent that the underlying documents fail to support the affiant's characterization of them, the court does not accept such characterizations.

[12] Moreover, the scoping decision substantially advanced legitimate land use interests. Given the fact that the Parcel was the largest remaining undeveloped area within a designated port, although plaintiffs may have wanted to develop it in stages, it

Accordingly, the City cannot be held liable for a taking based on the scoping determination of the EOEA, notwithstanding that the City may have urged the broad scope ultimately imposed. See Municipal Light Co. of Ashburnham v. Commonwealth, 34 Mass. App. Ct. 162, 170, rev. denied, 415 Mass. 1102, cert. denied 510 U.S. 866 (1993) (Commonwealth's opposition to a power plant based on public health and safety concerns did not constitute a regulatory taking where the state has not and cannot regulate that plant and its activities were confined to the role of an advocate before those Federal agencies which can and do regulate it). See also Hamilton v. Conservation Commission of Orleans, 12 Mass. App. Ct. 359, 369 (1981) (where the decision of a local authority denying a project was superseded by an order of the DEQE denying the project, the DEQE, and not the local authority, is liable for any taking which results).

B. Conditioning Permits

To the extent that the plaintiffs claim that the City induced EOEA to condition federal permits, there is no evidence in the record which supports that contention. Similarly, there is no evidence that EOEA conditioned its approval of the marina project on the rezoning of the upland portion of the Parcel to, permit the construction of condominiums; even if the Certificate for the EIR could be so construed there is no evidence that the City is responsible for the EOEA's imposing such a requirement. Similarly, there is no evidence that the City is responsible for how state chose to construe state regulations applying to designated port areas or for how the state chose to construe a state statute, G.L. c. 91. The law governing

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fostered legitimate environmental interests for the EOEA to require that the EIR consider the Parcel as a whole and for the City to encourage the EOEA to do that.

port areas substantially advances land use interests. To the extent that it may have been inappropriately applied to ONBW, and there is no such showing, it was the State and not the City that acted improperly, actions which ONBW chose not to challenge. Indeed, with respect to de-designation, the Mayor twice sought the de-designation desired by ONBW.

With respect to ONBW's argument that the City induced the Governor to condition the change in the harbor line on the upland not being selected as the site for the treatment facility, the plaintiffs have not established that the City is responsible for the amendment to the statute such that liability may be imposed on the City for that amendment. The only action of the City in connection with the legislation is a letter sent to Governor Dukakis, signed by nine City Councilors, requesting that the Governor not sign the harbor line bill until the City Council was able to hold a public hearing on the matter and adopt a formal position on the legislation.[13] That letter did not ask that the legislation not take effect until the DEP determined that the treatment plant would not be located on the Parcel. By contrast, taxpayer groups such as Save the Fort Rodman Committee actively lobbied the Governor that the status quo not be changed until there was a final siting decision. The plaintiffs have no credible evidence that the legislation was amended to condition the change in New Bedford's harbor line requested by ONBW on a final written determination of the siting of the wastewater treatment plant as the result of lobbying by city councilors as opposed to lobbying by New Bedford taxpayers and voters. Accordingly, the City is not liable for a regulatory taking, if any, based on the refusal to change the harbor boundary line.

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[13] The Save Fort Rodman Committee also sent the Governor a taxpayer petition opposing the location of the treatment plant at Fort Rodman on a variety of grounds. That petition had been signed by the seven City Councilors.

Municipal Light Co. of Ashburnham, supra, 34 Mass. App. Ct. at 170.

C. Denial of Rezoning Petition

Finally, the plaintiffs contend that the City's denial of ONBW's January 1990 rezoning petition constituted a regulatory taking because it failed to substantially advance a legitimate state interest. In examining a decision to rezone, a court may look to the information available to the City at the time it acted. Steinbergh, supra, 413 Mass. at 746-747.

The Industrial B zoning classification had been in effect for decades before the plaintiffs purchased the Parcel. There is no contention that the City took the affirmative step of spot-zoning the Parcel in order to prevent the plaintiffs from constructing condominiums on the upland. Instead, the gravamen of the plaintiffs' claim is that the City improperly failed to change the zoning classification to accommodate the plaintiffs' desire to use the Parcel in a more economically beneficial way.

A zoning classification is constitutionally valid unless it is clearly arbitrary and unreasonable with no substantial relation to the public health, safety, morals, or general welfare. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). See also Sturges v. Chilmark, 380 Mass. 246, 256 (1980). The decision as to whether the public interest mandates a change in the zoning ordinance is not governed by any stricter standards.

The main purpose of zoning is to stabilize the use of property and to protect an area from deleterious uses. Enos v. Brockton, 354 Mass. 278, 280 (1968). Once adopted, "zoning regulations are intended to have a certain degree of permanency, as evidenced by the fact that they are more difficult to amend than most other by-laws and ordinances." Id. at 281. In deciding whether to change an existing zoning classification, a city may consider the good of the city as a whole and future land use needs in addition to present conditions and use. Rosko v. Marlborough, 355 Mass. 51, 53 (1968); Lanner v. Board of Appeal of Tewksbury, 348 Mass. 220, 229 (1964); ACW Realty Management, Inc. v. Planning Board of Westfield, 40 Mass. App. Ct. 242, 247 (1996). "Plainly ... it is proper ... [for the City] to take into account the probable future development of the entire region." Wilbur v. Newton, 302 Mass. 38, 42 (1938).

The court's role in review of zoning enactments is limited and every presumption is made in favor of the by-law. "[I]f its reasonableness is fairly debatable, it will be sustained." Sturges, supra, 380 Mass. at 256. The plaintiffs have a heavy burden of showing a conflict with applicable constitutional provisions.

The plaintiffs emphasize that the City Council Ordinance Committee did not place on the record reasons for denying their rezoning petition. However, when the rezoning was first discussed in 1987, the City Planner and Planning Board Chairman had questioned, inter alia, whether the Parcel was "the most appropriate site of residential use being bracketed on the north and south by heavy industrial uses." There is nothing to suggest that the uses in the areas surrounding the Parcel had changed in the interim. At that stage, for numerous reasons, the plaintiffs had not yet secured permission from the EOEA to construct a marina. The DEP had also not yet determined that the City's upgraded wastewater treatment facilities would be sited at a location other than the Standard Times Field site, and thus no chapter 91 permit was forthcoming. The state had not allowed the de-designation request. The Parcel was the largest remaining undeveloped area within a designated port and there is no evidence that condominiums on the upland conformed to any comprehensive plan then in effect. When ONBW's petitioned for a zoning change in 1990, EOEA had not yet approved ONBW's final EIR. EOEA's Certificate had raised several concerns about the thoroughness of the draft EIR.

In denying a petition to change the zoning law, a municipality is not restricted to the arguments which were advanced before it voted. Id. The plaintiffs have failed to prove that the challenged classification bore no rational relationship to any permissible public object which the City may plausibly be said to have been pursuing. The requested rezoning was not part of a rezoning in conjunction with a far larger area following the adoption of a new master plan. There is no evidence that the Parcel was singled out for different treatment from that accorded surrounding land, producing classifications that failed to treat like properties in a uniform manner. A zoning classification is not unconstitutional merely because the owner of the land might have more profitably used the premises for some purpose not permitted by the existing zoning ordinance or bylaw.[14]

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[14] Furthermore, if the existing zoning ordinance as applied to the plaintiff did not substantially advance legitimate state interests and the City was required, as a matter of law, to grant the request for a zoning change, Nectow v. City of Cambridge, 277 U.S. 183 (1928), ONBW had the opportunity to obtain a judicial determination of the invalidity of the existing zoning ordinance. G.L. c. 240, § 14A. Any landowner may "petition for a decision concerning the validity or invalidity of any zoning restriction applicable to his land." Sturges, supra, 380 Mass. at 249. ONBW chose not to do so. The plaintiffs no longer own the land. "The Supreme Court of the United States has generally denied landowners the right to challenge land use regulations as takings until they have shown that available legal processes, not yet used, will not eliminate the alleged taking." Wilson v. Commonwealth, 413 Mass. 352, 356 (1992), citing MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 351 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985). This is not a situation in which the plaintiffs accept the legal validity of the action allegedly giving rise to the taking, but seek compensation. Accordingly, for the same reason that the plaintiffs cannot obtain relief against EOEA because of their failure to commence an action under G.L. 231A, it appears that they should not be able to proceed against the City on the grounds that the

In sum, the plaintiffs have failed to meet their heavy burden of demonstrating that the City's refusal to rezone did not substantially advance its legitimate interest in maintaining the longstanding zoning status of the Parcel.

II. TAKING BASED ON THE CITY'S ALLEGED PURPOSEFUL ATTEMPT TO DEPRESS THE PARCEL'S VALUE

ONBW also argues that even if the denial of its petition could be justified by some legitimate land-use interests, nonetheless the denial effected a taking because the real reason the City voted to deny the petition was to depress the Parcel's property values in order to minimize the cost of acquisition of the property should the wastewater treatment plant be located there.[15] The City's argument that the plaintiffs fail to state a claim because eminent domain proceedings never were instituted against the Parcel misses the point. Admittedly, an announcement that the government intends to take a particular parcel of land for public use does not itself constitute a taking even though such an announcement decreases the value of the property and the government subsequently fails to execute the taking. Cayon v.

City had no reason to continue to apply the Industrial B classification to the Parcel.

[15] The City is correct that the type of delay which commonly occurs in government-imposed processes, such as regulatory approvals or changes in local by-laws, have not traditionally been viewed as constituting regulatory takings. Steinbergh v. Cambridge, supra, 413 Mass. at 743; Wilson v. Commonwealth, 413 Mass. 352, 355 (1992). But see id. at 355-356 (concluding that an allegation that improper delay in the regulatory process caused the total destruction of plaintiffs' property stated a takings claim). However, the thrust of the plaintiffs' complaint is that the City took action to deliberately prevent development of the Parcel, not that the delay, in and of itself, constitutes a taking.

Chicopee, 360 Mass. 606, 610 (1971). In such a case, changes in the property's value are deemed to be "no more than incidents of ownership . .Id. The decreased value of the property that may follow from being the subject of an announcement that a taking is likely is the unavoidable by-product of a legitimate, good-faith exercise of the government's power of eminent domain. Plaintiffs do not, however, complain about the fact that the value of their property may have been depressed by the announcement that the City was considering siting the treatment plant on the Parcel.

Instead, the plaintiffs seek relief for what they claim was inverse condemnation arising out of a governmental entity purporting to exercise its police power through zoning, but actually intentionally acting to discriminate against a particular parcel of private land with the wrongful purpose of depressing its value so that it could be taken cheaply in eminent domain. ONBW alleges that the decline in property value was not unavoidable, but rather the deliberate and intended result of the City's attempt to take its property without paying full and just compensation. Courts have recognized such a cause of action. See, e.g., Orlando/Orange County Expressway Authority v. W&F Agrigrowth-Fernfield, Ltd., 582 So.2d 790, 792 (Fla. App.), rev. denied, 591 So.2d 183 (1991) (taking occurred where county used a "recorded reservation map" to impose a development moratorium on plaintiff s property for the sole purpose of depressing the land's value in anticipation of eminent domain proceedings); Business Ventures, Inc. v. Iowa City, 234 N.W.2d 376 (1975) (zoning ordinance subject to collateral attack in condemnation proceeding where owner's application for rezoning consistently tabled pending determination of park commission's acquisition plans); California v. Southern Pacific Transportation Co., 33 Cal. App. 3d 960, 965 (Cal. App. 1973) (where zoning applied by city to subject property was the implementation of a city policy to frustrate, by discriminatory spot zoning, development of discontinued railroad rights-of-way for other than street purposes, collateral attack upon zoning permitted); In re Crosstown Expressway, 281 A.2d 909, 913-914 (Pa. 1971) (complaint alleged that, after announcing an intent to take certain parcels of land for a highway project, the state urged the city of Philadelphia "to impede private development of properties within the proposed route").[16]

In order to prevail on the merits of such a claim, ONBW must demonstrate that the City abused its legitimate powers by intentionally taking actions respecting the Parcel for the specific purpose of depressing its value. In re Virginia Park, 328 N.W.2d 602, 606 (Mich. App. 1982). In addition, the plaintiff bears the burden of proving that the government's actions were a substantial cause of the decline of the property's value. Id. See also Heinrich v. City of Detroit, 282 N.W.2d 448, 450-451 (Mich. App. 1979). The plaintiffs failed to produce evidence that would satisfy these requirements.

A. Scope of the EIR

As discussed above, the plaintiffs are unable to prove that the City's official comments on ONBW's Draft EIR were a substantial cause of the EOEA's scoping decision and thus the City cannot be held liable for any decline in the value of the Parcel as the result of that decision. Furthermore, the plaintiffs have not established that the City's comments to EOEA constituted an abuse of its legitimate power intended to reduce the value of the Parcel so that the City might be able to acquire it cheaply in the future. The Mayor's letter to the EOEA detailed, inter alia, concerns having nothing to do with the timing of the project, concerns that were related to the fact that the Parcel was the largest remaining undeveloped area within a designated port. The comments by the City's Environmental Planner similarly stress the need for a comprehensive review for reasons unrelated to saving the City funds should it need to appropriate the Parcel. The optimal use of the largest undeveloped waterfront property in the City was a obvious and entirely legitimate municipal concern.

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[16] Massachusetts decisions have also suggested that, in some cases, eminent domain proceedings may be invalid because of the bad faith or improper motive of the government, such as where eminent domain power is used solely to benefit a private person or for the sole purpose of preventing the developers intended low income housing projects See Benevolent & Protective Order of Elks v. Planning Board of Lawrence, 403 Mass. 531, 551 (1988); Pheasant Ridge Associates, Ltd. Partnership v. Burlington, 399 Mass. 771, 775-776 (1987).

B. Change in the Harbor Line

The plaintiffs next contend that the City acted wrongfully and intentionally to reduce the Parcel's value by inducing the Governor not to sign the harbor line change legislation without an amendment conditioning the redrawing of the harbor line on the DEP's final determination that the wastewater treatment facility would be located at a location other than the Parcel. For the reasons discussed above, the plaintiffs have failed to establish the requisite causation to impose liability for a taking on the City in connection with that state executive and legislative action.

Moreover, the plaintiffs have not demonstrated that the City acted with the intent to depress the Parcel's value for purposes of a possible future eminent domain proceeding in connection with its activities concerning the amendment. They emphasize statements by City Councilor Ralph Saulnier to the effect that he would seek to delay enactment of the harbor line bill because its passage would increase the value of the Parcel, making it more expensive for the City to take it by eminent domain for the treatment plant. But the letter sent to Governor Dukakis that was signed by nine City Councilors does not make that argument; it simply requests that the Governor not sip the bill until the City Council was able to hold a public hearing on the matter and adopt a formal position on the legislation. An improper motive should not be attributed to a city if there are valid reasons that would have supported the city's action, especially when the action at issue is undertaken by a majority vote of members of a board of public officers who cannot act separately or individually. Pheasant Ridge Associates Ltd. Partnership v. Burlington, 399 Mass. 771, 775, 777 (1987). See also Moskow v. Boston Redevelopment Authority, 349 Mass. 553, 564 (1965), cert. denied, 382 U.S. 983 (1966). A municipality is not bound by the statements of individual officials not made as part of the action of a municipal board, nor are such statements admissions that may be used against the town. Id. Saulnier's statements were not made in connection with official action by the City Council concerning the harbor line boundary change and thus cannot be imputed to that body. The plaintiffs have not met their heavy burden of demonstrating that the City acted in bad faith with respect to the harbor line change. See Arrigo v. Planning Board of Franklin, 12 Mass. App. Ct. 802, 811, rev. denied, 385 Mass. 1107 (1981) (where the subjective motivation of a municipal board is relevant, the plaintiff bears the burden to show any impropriety).

C. Denial of Rezoning Petition

ONBW also argues that the City's denial of its rezoning petition, even if ostensibly done to regulate land usage in the public interest, constitutes a taking because the real purpose the City Council acted was to depress property values in order to minimize the costs of acquisition of the Parcel.[17] The plaintiffs point to the statements of various taxpayer groups opposing ONBW's rezoning petition because it would make it more costly for the City to take the Parcel. Where the issue is whether action taken by a legislative body is valid or reasonable, the private views, desires, or motives of individual citizens arc immaterial. Barrett v. Building Inspector of Peabody, 354 Mass. 38, 43 (1968) (evidence that the City Council received petition signed by 1,016 voters favoring a zoning change is not relevant to the validity of the zoning action taken). Accordingly, the motive of individual taxpayers or citizen lobby groups is not probative of the City Council's purpose in denying the zoning petition at issue.

The plaintiffs further argue that the Planning Board's recommendation in 1990 that the petition be approved makes clear that the City Council must have been motivated by a desire to depress the value of the property when it denied the petition. However, where a zoning amendment is at issue, the evidence heard by a planning board, which does no more than make an advisory recommendation, is not material. Wallace v. Building Inspector of Woburn, 5 Mass. App. Ct. 786, 787 (1977) (rescript).

The plaintiffs also point to the fact that, in connection with the 1988 Planning Board hearing on ONBW's initial zoning petition, the Standard-Times quoted five city councilors as stating that they were not in favor of the proposed rezoning because it would increase the value of the Parcel. Such statements, however, were not made in connection with official board action. See Moskow, supra, 349 Mass. at 564.

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[17] At the time when the City Council voted to deny the petition to rezone, the Mayor had already selected Fort Rodman as his choice for the treatment plant. Within three months of its denial of the petition, the City Council voted 6 to 5 to approve siting the facility as Fort Rodman.

Moreover, such statements were made two years before the action at issue.

Finally, the plaintiffs point to the statements of City Councilors Saulnier and Kruger to the effect that they opposed the zoning change because it would increase the value of the Parcel if the City were to acquire it for the treatment plant. However, the motive of the City Council, acting as a body, cannot be derived from the expressions of a particular councilor. See Boston Water & Sewer Comm'n v. Metropolitan District Comm'n, 408 Mass. 572, 578 (1990) (statements of individual legislators as to their reasons for acting on legislation are not an appropriate source from which to discover the intent of the legislation). While these two councilor's statements may be indicative of their individual motives in voting against the rezoning, such statements are not probative of what motivated the other councilors who voted against the rezoning. Cf. Simon v. Needham, 311 Mass. 560, 566 (1942) (where a town board advanced certain unsound or insufficient reasons in recommending the passage of a zoning amendment, the court should not assume that, in approving the amendment, the voters at town meeting were motivated by the improper reasons advanced).

Moreover, nothing the City did or did not do in failing to rezone in 1990 — whatever its motives — amounted to inverse condemnation. At that stage, the EOEA had not yet approved the final EIR[18] and, thus, the plaintiffs have not demonstrated that condominiums could have been built on the upland even if the Parcel had been rezoned. Rezoning was a condition prerequisite to construction of the condominiums, but not to obtain approval of the EIR. Further, to the extent that de-designation by the state was required before any condominiums could be constructed, that de-designation had to come from the state and it had not. The City had officially sought de-designation in December of 1989 and again in February of 1990. Finally, although there is evidence that the plaintiffs would have constructed the marina if permitted to do so by the state and federal governments even in absence of permission to construct condominiums, there is no evidence whatsoever that ONBW would have constructed condominiums on the upland in this heavily industrial area of the City if not permitted to go forward with the marina. When the City declined to rezone the Parcel, the DEP had not determined that the upgraded wastewater treatment facilities for the City would be sited at a location other than the Parcel and thus ONBW could not get a permit under chapter 91 to construct the marina.[19]

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[18] Indeed, there is no evidence in the record that EOEA ever approved the final EIR.

In sum, the plaintiffs have failed to establish a claim of inverse condemnation based on affirmative actions by the City discriminating against the Parcel with the wrongful purpose of depressing its value with a view to future takings in eminent domain.

III. TAKING BASED ON ALLEGED DEPRIVATION OF ECONOMIC USE OF PARCEL

Finally, the plaintiffs contend that they are entitled to judgment on the ground that the cumulative joint actions of the City, the EOEA, and the New Bedford taxpayers prohibited all economically viable use of the Parcel, thus constituting a categorical taking for which they must be compensated. Government regulations may deprive an owner of the most beneficial use of its property without rendering the regulation a taking for which compensation is required. Daddario, supra, 425 Mass. at 416-417. "Land use planning is not an all-

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[19] There is no evidence that ONBW had received the necessary federal permits to construct the marina.

or-nothing proposition. A government entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of the property." Id. at 417, quoting, MacDonald, Sommer & Frates v. of Yolo 477 U.S. 340, 347 (1986).

However, a regulation which goes "too far" by prohibiting all economically viable use of the property constitutes a categorical taking which is compensable without case-specific inquiry into the public interest sought to be advanced. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015--1016(1992); 413 Mass. at 741. Regulations which "leave the owner of land without economically beneficial or productive options for its use — typically ... by requiring land to be left substantially in its natural state — carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." Lucas, supra, 505 U.S. at 1018. Even a temporary loss of all economically viable use of private property may constitute a compensable taking. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); Steinbergh, supra, 413 Mass. at 741-742 & n. 6.

As discussed above in connection with the plaintiffs' alternative takings theories, the plaintiffs have failed to demonstrate that the City caused the EOEA to decide as it did with respect to the scope of the EIR, caused the legislation to be amended so that the harbor line change would not take effect until after the DEP had issued a written determination that the wastewater treatment facilities would not be sited at the Parcel, or caused the state not to de-designate the Parcel. The City is not liable for the decisions made by these other entities. See Municipal Light Co. of Ashburnham, supra, 34 Mass. App. Ct. at 170.

Plaintiffs fare no better with their contention that the City's denial of ONBW's 1990 petition to rezone the Parcel deprived them of all economically beneficial use of the Parcel. The plaintiffs bear the burden of proving both that the City's action deprived them of all economically beneficial use of the Parcel and that the use desired was otherwise permitted under various other regulations. Lopes v. Peabody, 417 Mass. 299, 306-307 (1994).

The denial of ONBW's petition to rezone affected only ONBW's ability to develop one part of the Parcel, the upland. "Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." Moskow v. Commissioner of Environmental Management, 384 Mass. 530, 533 (1981). Thus, restrictions on a landowner's right to construct condominiums on his property is not necessarily a regulatory taking if the property as a whole retains substantial value. Daddario, 425 Mass. at 416. Plaintiffs have made no showing that condominiums were economically viable on the upland in the absence of the marina. Indeed, the plaintiffs bought the Parcel primarily because of its potential to be developed into a marina and marine related uses. They believed that with a marina, even if condominiums could not be built, the value of the upland would be substantially enhanced. Thus, it was not the failure to rezone that deprived ONBW of all economically beneficial use of the Parcel. ONBW had no demonstrated interest in taking advantage of the rezoning, should its petition have been granted, nor has it shown that it would have been economically viable to have done so, in the absence of permission for the marina to be developed. There is no evidence that the City's failure to rezone had any impact upon the state's failure to take the actions that were necessary for the marina to be built. Plaintiffs have also not demonstrated that the use that would have been permitted had its petition to rezone been allowed would otherwise have been permitted under non-zoning regulations.

Furthermore, where, as here, a landowner purchases property subject to a particular land use restriction, he cannot complain about the loss of a right he never had. When the plaintiffs bought the parcel, they were aware that it was not zoned for condominiums because residential uses were not allowed within an Industrial B district. A property owner's investment-backed expectations must be reasonable, predicated on existing conditions, and more than a unilateral expectation or an abstract need. Leonard v. Brimfield, 423 Mass. 152, 155, cert. denied, 117 S.Ct. 582 (1996). The plaintiffs acquired the Parcel when the zoning classification was already in effect.

In sum, the plaintiffs have failed to demonstrate a compensable regulatory taking by the City.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the plaintiffs' motion for summary judgment be **DENIED** and that the defendants' cross-motion for summary judgment be **ALLOWED**.

/s/
E. Susan Garsh
Justice of the Superior Court

DATED: November 2, 1998